# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

## No. 65

THE UNITED STATES, PETITIONER

vs.

BINGHAMTON CONSTRUCTION CO., INC.

## No. 78

BINGHAMTON CONSTRUCTION CO., INC., PETITIONER

vs.

THE UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 48525

BINGHAMTON CONSTRUCTION CO., INC., PLAINTIFF

*v.*

UNITED STATES OF AMERICA, DEFENDANT

*Petition*

Filed January 22, 1948

*To the Court of Claims of the United States:*

The petition of the plaintiff respectfully represents that:

I

1. The plaintiff is, and at all times hereinafter referred to was, a corporation organized and existing under the laws of the State of New York, with its principal place of business in Binghamton, New York.

2. The plaintiff has, at all times, borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government.

2 3. On or about March 29, 1941, the United States Army Engineer Office at Binghamton, New York, invited bids for the construction of Flood Protection Project (Section No. 1) along the right bank of the Chemung River within the limits of the City of Elmira, Chemung County, New York. The plaintiff, in response to such invitation, submitted a bid in the fixed amount of $232,669.30 which, on April 29, 1941, was accepted. Pursuant to such bid and acceptance, there was subsequently executed Contract No. W-321-eng-261, dated May 14, 1941 (hereinafter referred to as the "contract"), a copy of the material portions of which is annexed hereto. Such contract was an authorized and binding obligation of the defendant.

II

4. Under the provisions of the Act of August 30, 1935, 49 Stat. 1011—the so-called Davis-Bacon Act—the contract was required to, and did, contain a provision obligating the plaintiff to pay not less than the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and me-

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chanics employed on projects of a character similar to the contract work in the territorial area in which such work was to be performed. In the Specifications for the work covered by the contract, which Specifications, dated March 29, 1941, were issued as of the date thereof in connection with the advertisement for bids as the basis upon which such bids were to be made, and which were appended to and made a part of the definitive contract, the representation was made that the Secretary of Labor had determined the prevailing wage rates in the locality; and such rates were set forth in Paragraph 1-31 of the Specifications. Among the rates so given were the following:

3

| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.00 |
| * * * * * | |
| Laborers, unskilled | .50 |
| Laborers, concrete puddlers | .50 |
| * * * * * | |

5. The plaintiff, acting on the basis of the wage rates stated in the Specifications, as it was invited and entitled to do, computed and submitted its bid. Subsequent to the acceptance of such bid and after the execution of the definitive contract, the plaintiff discovered that the wage rates for the classifications of labor referred to above in Paragraph 4 were not in fact the prevailing rates for such labor as determined by the Secretary of Labor, neither as of the time of the issuance of the Specifications, the acceptance of the bid, nor the execution of the contract; and that the Secretary of Labor in at least one instance, namely, on February 25, 1941, had determined the prevailing wage rates in the locality for these classifications of labor on a similar project to be higher than those stated in the Specifications of March 29, 1941, as follows:

| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.125 |
| * * * * * | |
| Laborers, unskilled | .55 |
| Laborers, concrete puddlers | .55 |
| * * * * * | |

Such determination of the Secretary of Labor was still in effect and unmodified on March 29, 1941, and the Specifications issued by the defendant on such latter date were defective and misleading in failing to reflect such determination.

4 6. Upon commencing work under the contract, the plaintiff was unable to procure labor of these classifications at the rates stated in the Specifications, and was in fact obliged to pay higher rates, as follows:

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| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.125 |
| • • • • • | |
| Laborers, unskilled | .625 |
| Laborers, concrete puddlers | .625 |
| • • • • • | |

7. The plaintiff was entitled to, and did, rely upon the wage rates stated in the Specifications as being in accordance with the most recent determinations by the Secretary of Labor of the wage rates prevailing for the corresponding classes of workmen on similar projects in the area; and was entitled to, and did, prepare and submit its bid on this assumption. When, after the acceptance of its bid and the execution of the contract, it discovered the error in the representations made to it, it was entitled to be reimbursed at the higher rates which it was required to pay in order to perform the contract work, to the extent that such higher rates were equivalent to the prevailing rates fixed by the Secretary of Labor in her determination of February 25, 1941. The plaintiff duly requested such reimbursement by appropriate adjustment in the contract price, but the defendant wrongfully denied such request.

8. The failure of the defendant so to adjust the contract price has resulted injury and damage to the plaintiff in the amount of $8,048.04, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

5 III

9. The 62½¢ hourly wage rate with respect to laborers (both unskilled and concrete puddlers) which the plaintiff was obliged in fact to pay in order to procure labor to perform the contract work was, in fact, the prevailing hourly rate in the locality at the time of the issuance of the Specifications, the acceptance of the bid, and the execution of the contract; and the 55¢ rate fixed in the Secretary of Labor's determination of February 25, 1941, was less than the actual prevailing rate at such times. The failure of the defendant to make an accurate representation in the Specifications to the plaintiff with respect to the hourly rate actually prevailing at the time of the issuance of the Specifications, was a breach of the defendant's obligation to state such prevailing rates correctly and not to mislead the plaintiff by representing that the prevailing rates were lower than they were in fact. Because of the fact that the plaintiff was obliged to pay the 62½¢ prevailing rate in order to procure labor to perform the contract work, the plaintiff was entitled, in addition to the claim hereinabove described under Section II, to be further reimbursed for the dif-

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ference between the 55¢ rate for laborers fixed in the Secretary of Labor's determination of February 25, 1941, and the 62½¢ hourly rate actually prevailing at the time of the issuance of the Specifications, the acceptance of the plaintiff's bid, and the execution of the contract, which 62½¢ rate the plaintiff was required to, and did, pay. Plaintiff duly requested such reimbursement but the defendant wrongfully denied such request.

10. The failure of the defendant to make such reimbursement has resulted in injury and damage to the plaintiff in the
6 amount of $5,863.79, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

IV

11. Paragraph 7–05 (d) of the Specifications contained a detailed description of the manner in which, and the materials with which, the concrete involved in the construction was to be finished. In submitting its bid, the plaintiff was entitled to, and did, rely upon the statements made in said Paragraph 7–05 (d) in computing the cost to it of finishing such concrete. During the performance of the contract, the defendant ordered and required the plaintiff to finish the concrete in a manner and with materials not specified in, or reasonably contemplated by, the Specifications, with the result that plaintiff was subjected to unauthorized and unanticipated costs, reimbursement of which was duly requested by the plaintiff but wrongfully denied by the defendant.

12. The defendant's wrongful conduct in this respect has resulted in injury and damage to the plaintiff in the amount of $7,082.74, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

V

13. Under the provisions of Paragraph 3–06 of the Specifications, the plaintiff was required to furnish certain sheeting and shoring. Subparagraph (c) of said Paragraph 3–06 provided that such sheeting and shoring was to be measured "by the square foot of protected area," and subparagraph (d) of said Paragraph 3–06 provided that payment for sheeting and shoring would
7 be made at the contract unit price of Sixty-five Cents ($0.65) per square foot, as stated in the Schedule of Payments annexed to and made a part of the contract.

14. In computing its bid, the plaintiff was entitled to, and did, rely upon the statements contained in Paragraph 3–06 as to the measurement of sheeting and shoring by the square foot of protected area, and computed its bid on the basis of square footage

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of the area required to be protected. During the performance of the contract, however, the defendant refused to pay the plaintiff for sheeting and shoring in accordance with the square footage of the protected area, and, instead, followed an arbitrary and unauthorized method of measurement, not in accordance with the Specifications, which resulted in the underpayment of the plaintiff for sheeting and shoring. Although the plaintiff duly requested payment of the proper amount as contemplated by the contract, such request was wrongfully refused by the defendant.

15. The wrongful conduct of the plaintiff in this respect resulted in injury and damage to the plaintiff in the amount of $14,110.85, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

VI

16. Although the plaintiff duly and formally protested to the Contracting Officer the wrongful actions complained of above, the Contracting Officer refused to afford the plaintiff any relief, and, upon appeal to the Chief of Engineers, was upheld by the latter. Appeals by the plaintiff to the War Department Board of Contract Appeals were, on January 14, 1947, dismissed for an
8 asserted lack of jurisdiction. Except as hereinbefore referred to in this Paragraph 16, no action on the claims has been taken by Congress or by any department of the government.

17. The plaintiff is justly entitled to recover from the defendant the aggregate sum of $35,105.22, after allowing all just credits and offsets.

18. The plaintiff has made no assignment or transfer of the claims or any part thereof, and no persons other than the plaintiff are owners of the claims or of any interest therein.

Wherefore, it is respectfully prayed that judgment be granted against the defendant and in favor of the plaintiff for the sum of $35,105.22, together with such costs as may be properly allowable to it in respect of this suit.

DOUGLAS, PROCTOR, MACINTYRE & GATES,
*Attorneys for the Plaintiff, Office and Post Office Address, 730 Southern Building, Washington 5, D. C.*

9 [*Duly sworn to by Malcolmn A. MacIntyre; jurat omitted in printing.*]

10 *Exhibit to Petition*

U. S. Standard Form No. 23—Rev.

Approved by the Secretary of the Treasury. Revised September 17, 1938. Contract No. W-321-eng-261. Dated May 14, 1941.

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CONTRACT

(Construction)

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
Binghamton, New York
(Department)

BINGHAMTON CONSTRUCTION CO. INC.
MARINE MIDLAND BANK BUILDING
Binghamton, New York
(Contractor)

Contract for Elmira Flood Protection Project (Section No. 1), Amount, $232,669.30.

Place, Right Bank of Chemung River, Elmira, New York.

CONTRACT FOR CONSTRUCTION

This contract, entered into this 14th day of May 1941, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Binghamton Construction Co., Inc., a corporation organized and existing under the laws of the State of New York, of the city of Binghamton, in the State of New York, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Statement of work.—The contractor shall furnish the materials, and perform the work for construction of Flood Protection Project (Section No. 1) along the right bank of the Chemung River, within the limits of the City of Elmira, Chemung County, New York, for the consideration shown on Schedule of Payments attached hereto, in strict accordance with the
11 specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications: No. 321–41–15 War Department Appropriation: 21X3113 Flood Control, General Flood Protection Project (Section No. 1) at Elmira, New York, dated U. S. Engineer Office, Binghamton, New York, March 29, 1941, with Addendum No. 1, dated April 12, 1941, attached thereto.

Schedules: Payments, in three (3) sheets.

Progress chart marked "Major Operations of Elmira Flood Protection Section #1 Submitted by Binghamton Constr. Co."

Drawings: Maps and drawings marked "Southern New York Flood Control Project, Elmira Flood Protection Project, Section

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number one, Elmira, New York, in 32 sheets, designated in paragraph 1–04 of the specifications cited, as modified by Addendum No. 1.

The work shall be commenced within ten (10) calendar days after the date of receipt by the contractor of notice to proceed and shall be completed within five-hundred and fifty (550) calendar days after said date of receipt of notice to proceed.

ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * *

ARTICLE 17. Rate of wages (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections
12 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of

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wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

* * * * *

13 In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

Approved June 3, 1941.

THE UNITED STATES OF AMERICA,
By (S) J. C. Marshall,
J. C. MARSHALL,
*Major, Corps of Engineers,*
*District Engineer* (*Official Title*).

(S) J. N. Hodges,
J. N. HODGES,
*Colonel, Corps of Engineers,*
*Division Engineer, North Atlantic Division.*

BINGHAMTON CONSTRUCTION CO. INC.,
*Contractor.*

[CORPORATE SEAL] By (S) DONALD G. DAVIS,
*Pres., Marine Midland Bank Bldg., Binghamton, New York* (*Business Address*).

Two witnesses:

(S) HELEN G. CAMERON.
(S) JOAN MINNOW.

I, Joseph J. Cox, certify that I am the secretary of the corporation named as contractor herein; that Donald G. Davis who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL] (S) JOSEPH J. COX,
*Secretary.*

*Exhibit to Petition*

14 This project is authorized by the act of June 22, 1936 (Public No. 738, 74th Congress (as amended by the act approved June 28, 1938 (Public No. 761, 75th Congress).

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No. 321-41-15

U. S. ENGINEER OFFICE,
*Binghamton, New York, March 29, 1941.*

WAR DEPARTMENT

Appropriation: 21X3113 Flood Control, General Flood Protection Project (Section No. 1) at Elmira, New York.

SPECIFICATIONS

## Section I. General Provisions

1-01. Location.—The site of the proposed work is along the right bank of the Chemung River within the limits of the City of Elmira, Chemung County, New York.

1-02. Work to be Done.—(a) The work provided for herein is authorized by the act approved June 22, 1936 (Public No. 738, 74th Congress) as amended by the act approved June 28, 1938 (Public No. 761, 75th Congress).

(b) The work to be done consists of furnishing all plant, labor, equipment, and materials, and performing all work required for the construction of Flood Protection Project (Section No. 1) at Elmira, New York, and all appurtenant works, complete in strict accordance with these specifications and maps and contract drawings forming a part hereof. It will consist of the following major items:

(1) Construction of levee embankments.
(2) Construction of new concrete walls.
(3) Raising an existing wall.
(4) Construction and alteration of sewers, culverts, drains, and manholes.

* * * * *

15 1-31. Wage and Labor Provisions.—(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.00 |
| Cement finishers, structures | 1.50 |
| Electricians | 1.12½ |
| Laborers, unskilled | .50 |
| Laborers, concrete puddlers | .50 |
| Mechanics, heavy equipment | 1.00 |
| Oilers, heavy equipment | .85 |
| Operators, air compressors, 160 cubic feet and under | .85 |
| Operators, air compressors, over 160 cubic feet | 1.00 |

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| *Designation* | *Wage rate, hourly* |
|---|---|
| Operators, batcher plant | $0.60 |
| Operators, bulldozers | 1.00 |
| Operators, cranes and draglines | 1.50 |
| Operators, clamshells | 1.50 |
| Operators, hand held rock drill | .75 |
| Operators, mixers, under 21E | 1.00 |
| Operators, mixers, 21E and over | 1.50 |
| Operators, pump, 4 inc. and under | .75 |
| Operators, pump, over 4-in | 1.00 |
| Operators, piledrivers | 1.50 |
| Operators, shovels | 1.50 |
| Operators, tractors | .85 |
| Operators, wagon drill, pneumatic | .90 |
| Powdermen (blasters) | .75 |
| Reinforcing rodsetters | 1.50 |
| Truck drivers | .55 |

Welders—Receive the rate prescribed for craft performing operation to which welding is incidental.

The above list of wages shall be posted by the contractor in a conspicuous place on the work.

16 (b) In the event that it becomes necessary to employ any laborer or mechanic whose work is not covered by any of the classifications in the schedule, he shall be paid not less than the prevailing rate of wages in the locality where the work is done for the class of work done by him. Such rate shall be determined by the contracting officer. In case any dispute arises as to what are the prevailing rates of wages for work of a similar nature that cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination, and his decision shall be conclusive on all parties hereto.

* * * * *

1–38. Approval.—This contract shall be subject to the written approval of the Division Engineer, North Atlantic Division, and shall not be binding until so approved.

* * * * *

3–06. Sheeting and Shoring—(a) General.—The contractor shall furnish and place such sheeting, shoring, bracing, or other approved supports as are indicated on the contract drawings or directed by the contracting officer for the protection of the work or adjoining property. The right is reserved to order the installation of sheeting and shoring where its use is considered advisable for the safety of the work, and to require such sheeting and shoring to remain in place when its removal is considered inadvisable.

(b) Procedure.—All sheeting and shoring shall be designed by the contractor and approved by the contracting officer prior to installation, but such approval by the contracting officer shall not relieve the contractor of sole responsibility for damages resulting from the inadequacy or lack of any sheeting and shoring. The sheeting and shoring shall be built to provide adequate clearances

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for minimum interference with construction operations, proper bracing for stability, and safe conditions around the work. If, in the opinion of the contracting officer, any methods or measures of the contractor constitute a hazard in any way or are otherwise improper or inadequate, the contracting officer will notify the contractor of that fact in writing. If the contractor fails to provide immediately such remedial measures as are deemed necessary by the contracting officer, such measures will be provided by the contracting officer at the expense of the contractor. When sheeting and shoring have served their purpose and their removal is approved by the contracting officer, they shall be removed and disposed of. Whether sheeting and shoring are removed or left in place, all cavities shall be adequately filled. When approved by the contracting officer, sheeting and shoring may be used in lieu of excavation to full pay lines.

17

(c) Measurement.—Sheeting and shoring will be measured by the square foot of protected area.

(d) Payment.—Except as specified below, payment for all costs of furnishing and placing sheeting and shoring indicated on the contract drawings or directed by the contracting officer, and of its removal and disposal when not left in place, will be made at the contract unit price for "Sheeting (Including Shoring)," Item No. 7. Where sheeting and shoring are used at the contractor's option and with the approval of the contracting officer, separate payment will not be made for the sheeting and shoring, but payment will be made for excavation to the pay lines shown on the contract drawings as though the cut had been made to such pay lines.

* * * * *

7–05. Details of Construction.—

(d) Finishing.—Immediately following removal of forms, all form tie holes shall be filled, protruding fins or other surface irregularities removed by carborundum stone and all other defects repaired. Where necessary to obtain a suitable surface finish, the contractor shall remove the form and finish the surfaces when and as directed by the contracting officer at no additional cost to the United States. The curing specified in subparagraph 7–05 (e) following shall be temporarily suspended during such repairing or finishing as directed. The finished surfaces shall be free from sand streaks or other defects and the plastering over of such surfaces will not be permitted. Defective concrete shall be repaired by cutting out the unsatisfactory material and placing new concrete which shall be formed with keys, dovetails, and anchors to attach it securely to the other work. This concrete shall be drier than the usual mixture and shall be thoroughly tamped into place. All surfaces of concrete, not covered

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by forms, that are not to be covered by additional concrete or backfill shall have a wood float finish without additional mortar, and shall be true to elevations as shown on contract drawings. Striking-off and finishing shall follow closely the placing operation in order to insure completion before the initial set has taken place. The contractor will not be permitted to start a pour unless a sufficient number of qualified finishers are available to fulfill the above requirements. Care shall be taken to see that all excess water is removed before making the finish. Other surfaces shall be brought to the specified finished elevation and left true and regular as approved by the contracting officer. Where considered necessary by the contracting officer, or where indicated on the drawings, joints shall be made carefully with a jointing tool. Every precaution shall be taken by the contractor to protect finished surfaces from stains or abrasions. No fire shall be permitted in direct contact with any concrete at any time. Concrete surfaces or edges likely to be injured during the construction period shall be properly protected by leaving the forms in place or by erecting covers satisfactory to the contracting officer.

* * * * *

19 *General traverse*

Filed March 2, 1948

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) H. G. MORISON,
*Acting Assistant Attorney General.*

ETF, JJS.

21 In the United States Court of Claims

[Title omitted]

*Report of commissioner*

Filed June 5, 1951

*To the Honorable the Chief Judge and Associate Judges of the United States Court of Claims:*

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

1. Plaintiff is, and at all times material herein has been, a corporation organized and existing under the laws of the State of New

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York with its principal office and place of business at Binghamton, New York. Since its formation in 1929, it has been engaged in business as a general contractor.

2. On March 29, 1941, defendant acting by and through the War Department's Corps of Engineers' Office at Binghamton, New York, invited bids for the construction of Flood Protection Project (Section No. 1) along the north bank of the Chemung River, within the limits of the city of Elmira, Chemung County, New York. In response to said invitation, plaintiff submitted a bid based upon a unit price applied to the various operations involved in the performance of the work in the total sum of $232,669.30. This bid was accepted by defendant on May 14, 1941. On that date plaintiff and defendant entered into a written contract, No. W–321–eng–261, which was approved June 3, 1941. On June 5, 1941, defendant gave plaintiff a formal notice to proceed with the work. Actual work commenced on the site of the job on June 3, 1941.

3. The contract was performed by plaintiff, and it has been paid the contract price, as adjusted, for change orders with
22 the exception of $100 which plaintiff instructed the District Engineer to withhold, and plaintiff has refused to accept said $100 from defendant on advice of its counsel.

4. Plaintiff sues for the sum of $35,105.42, the total of three separate claims, as follows:

| | |
|---|---|
| Claim for reimbursement of wage rates paid to carpenters, laborers, and concrete puddlers | $13,911.83 |
| Claim as regards measuring of sheeting and shoring | 14,110.85 |
| Claim for finishing of concrete | 7,082.74 |
| Total | 35,105.42 |

Each claim will be discussed separately.

WAGE RATES

5. Before bidding, plaintiff had a copy of the specifications. Section 1–31 of such specifications reads, insofar as here pertinent, as follows:

"1–31. Wage and Labor Provisions.—(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.00 |
| • • • • • | |
| Laborers, unskilled | .50 |
| Laborers, concrete puddlers | .50 |
| • • • • • | |

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6. Article 17 of the contract reads as follows:

"ARTICLE 17. Rate of wages (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

"(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contract-
23 ual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; an the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

"(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby."

7. On January 31, 1941, the Secretary of Labor furnished to the Corps of Engineers at its request, for inclusion in the contract specifications, the schedule of minimum wages in the Elmira area. Such schedule was included in the specifications and is set out in finding 5.

8. On June 16, 1941, plaintiff advised the District Engineer (who was the contracting officer) that the minimum wage rates provided in the contract specifications were less than the rates currently prevailing in the Elmira locality for carpenters, labor-

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ers (unskilled), laborers (concrete puddlers), and truck drivers.

9. The District Engineer replied on June 27, 1941, stating that the minimum wage rates were determined in strict accordance with the applicable law and regulations, and that he could not afford relief for any differences between wage rates then prevailing in the area and the minimum rates required by the contract specifications.

24 10. Plaintiff protested this decision to the Chief of Engineers under date of July 10, 1941, and on August 5, 1941, plaintiff's appeal was denied by the Chief of Engineers in part as follows:

"There is no authority in law for this office to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions of the above cited act [49 Stat. 1011]. Therefore, I find that the wage rates as established by the Secretary of Labor, and incorporated in the contract specifications, were the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work."

11. Plaintiff under date of February 20, 1943, asked defendant to reconsider its appeal regarding minimum wage rates, and this was responded to by letter dated April 13, 1943, from the Chief of Engineers, in part as follows:

"A determination as to the accuracy of the specified wages is not necessary to a decision in this case. The contract by Article 17 and by paragraph 1–31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract. No reason has been shown which would warrant modification of the previous decision dated August 5, 1941."

12. On March 4, 1941, the Secretary of Labor furnished to the Public Buildings Administration of the Federal Works Agency a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira, New York. The prevailing wage rates shown therein as far as here material were as follows:

| *Classification* | *Hourly rate* |
|---|---|
| Carpenters, journeymen | $1.125 |
| Laborers, unskilled | .55 |

13. At the time plaintiff began work on the site, which as indicated in finding 2 was June 3, 1941, it had to pay $0.625 per
25 hour for laborers and $1.125 per hour for carpenters. This



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was the union rate effective April 1, 1941, and the plaintiff employed only union members. Sometime in 1942, there was an increase in union rates for carpenters from $1.125 to $1.25 per hour, and for laborers from $0.625 to $0.75 per hour. Although plaintiff paid such increased wage rates, it is not claiming in this suit any excess over the laborers' rate of $0.625 and the carpenters' rate of $1.125 except such overtime as related to the latter rates.

14. Although the plaintiff's president denied that he had any knowledge of the prevailing rates for wages in Elmira at the time of the submission of plaintiff's bid, and states that he relied upon the schedule of minimum wage rates included in the bidding specifications, he could have, with very little effort and the exercise of reasonable prudence, ascertained not only the prevailing rates, but the impending increase in union rates for carpenters and laborers which was effective on April 1, 1941.

15. Since plaintiff has lost some of its original payroll records (which would identify the class of work performed by an employee), it is not possible to verify plaintiff's claim for $13,911.83 from its books and records. It will be possible, however, in the event that the Court should conclude that plaintiff is entitled to recover, to reconstruct such payrolls for carpenters and laborers and to establish with reasonable accuracy the amount of such recovery. For the foregoing reason, no finding is made as to the amount of plaintiff's damage on the claim for reimbursement of wage rates for carpenters and laborers over and above the minimum wage rates set out in finding 5.

SHEETING AND SHORING

16. The contract specifications provide in part as follows:

"Section I

"1-14. Work Areas.—* * *

"(b) The contractor shall be responsible for trespassing upon, or damage to, public and private lands and roads, bridges, buildings, chimneys, and utilities in or adjacent to the work and access areas resulting from any act or omission on his part, including damage caused by disturbance of foundations while conducting any
26 operation within the work area. The contractor shall take special precautions to prevent injury to existing structures while working in the vicinity of the Hygeia plant, Brand building, greenhouse, gas regulation house, private dwellings, and all other buildings and structures located at or close to the edge of the work area. He shall take similar precautions in the vicinity of the pole line crossing the levee at West Hudson Street, the water

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main at approximate Station 176+37, all power facilities at the Hygeia plant, and any other utilities which will not be relocated.

* * * * *

"(d) The garage and other property of the Hygeia Refrigerating Company are within the work area, and the activities of this company will be carried on during construction of the project. The contractor shall cooperate with this company during all construction operations in order to preserve its access and permit its operations to be conducted with a minimum of interference by the contractor. The contractor shall perform the necessary construction on the company's property in the least practicable time. He shall provide bracing or other protection satisfactory to the contracting officer for the garage wall against which the new wall is placed. The garage and other property within the work area shall be restored to a condition satisfactory to the contracting officer upon completion of the permanent work in that area.

* * * * *

"Section III

"3.03. Excavation—Common. * * *

"(b) Procedure—(1) General.—Excavation—Common shall be performed in accordance with subparagraph 3–01 (c). Excavation around bridge piers and abutments, existing walls, buildings, chimneys, transformers, power lines, utilities, sewers, culverts, and other existing structures shall be executed with all due precautions, satisfactory to the contracting officer, for safeguarding the structures. (See paragraphs 1–14.) Where special work is required to prevent undermining existing structures, it shall be done in accordance with detailed plans prepared by the contractor and approved by the contracting officer, but such approval shall not relieve the contractor of responsibility for damages which may result from the failure of the temporary protection. Where excavation operations endanger the stability of existing or new structures, sheeting and shoring shall
27 be installed at the locations indicated on the drawings or directed by the contracting officer. The contractor shall be responsible for safety of such structures. (See subparagraph (3) below and paragraph 3–06.) * * *

* * * * *

"(3) Sewers, Culverts, and Drains.—The contractor shall furnish and install sheeting and shoring in all trenches where the depth exceeds 6 feet. * * *

* * * * *

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"3-06. Sheeting and Shoring—(a) General.—The contractor shall furnish and place such sheeting, shoring, bracing, or other aproved supports as are indicated on the contract drawings or directed by the contracting officer for the protection of the work or adjoining property. The right is reserved to order the installation of sheeting and shoring where its use is considered advisable for the safety of the work, and to require such sheeting and shoring to remain in place when its removal is considered inadvisable.

(b) Procedure.—All sheeting and shoring shall be designed by the contractor and approved by the contracting officer prior to installation, but such approval by the contracting officer shall not relieve the contractor of sole responsibility for damages resulting from the inadequacy or lack of any sheeting and shoring. The sheeting and shoring shall be built to provide adequate clearances for minimum interference with construction operations, proper bracing for stability, and safe conditions around the work. If, in the opinion of the contracting officer, any methods or measures of the contractor constitute a hazard in any way or are otherwise improper or inadequate, the contracting officer will notify the contractor of that fact in writing. If the contractor fails to provide immediately such remedial measures as are deemed necessary by the contracting officer, such measures will be provided by the contracting officer at the expense of the contractor. When sheeting and shoring have served their purpose and their removal is approved by the contracting officer, they shall be removed and disposed of. Whether sheeting and shoring are removed or left in place, all cavities shall be adequately filled. When approved by the contracting officer. sheeting and shoring may be used in lieu of excavation to full pay lines.

"(c) Measurement.—Sheeting and shoring will be measured by the square foot of protected area.

28 "(d) Payment.—Except as specified below, payment for all costs of furnishing and placing sheeting and shoring indicated on the contract drawings or directed by the contracting officer, and of its removal and disposal when not left in place, will be made at the contract unit price for 'Sheeting (Including Shoring),' Item No. 7. Where sheeting and shoring are used at the contractor's option and with the aproval of the contracting officer, separate payment will not be made for the sheeting and shoring, but payment will be made for excavation to the pay lines shown on the contract drawings as though the cut had been made to such pay lines."

17. The schedule of payments incorporated into the contract in suit provided in item 7 that the plaintiff was to be paid for sheeting (including shoring) on a quantity of 9,200 square feet at the rate of 65 cents per square foot, or a total of $5,980.

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18. Section I, paragraph 1–05, provides in pertinent part as follows:

"1–05. Quantities.—The following estimate of quantities is given only to serve as a basis for comparison of bids and for determining the amount of consideration of the contract. Within the limits of available funds, the contractor will be required to perform the entire quantity of work necessary to complete the work specified in paragraph 1–02 hereof, be it more or less than the amounts herein estimated.

* * * * *

"Item No. 7 Sheeting (Including Shoring) 9,200 Sq. Ft."

* * * * *

19. As the work progressed, the plaintiff placed sheeting and shoring necessary for the protection of the work as well as that necessary for the protection of existing buildings and structures. Payment was made on account of such sheeting and shoring, as well as the other work performed by the plaintiff, on monthly estimates prepared by defendant's resident engineer and given to plaintiff's superintendent together with a payment voucher for execution on behalf of plaintiff. The plaintiff executed such payment vouchers and forwarded them along with each monthly estimate for payment by the defendant's paying office. On the second such monthly estimate forwarded with a payment voucher by plaintiff, an item of 438 square feet of sheeting, including
29 shoring, appears under item 7. On subsequent monthly estimates supporting payment vouchers, under item 7 appears a figure covering additional sheeting, including shoring. The plaintiff accepted monthly payments on such payment vouchers without question as to the manner of computation of the sheeting (including shoring) item until the final estimate was received by the plaintiff showing a total of 10,152 square feet.

20. After all of the work under the contract had been performed, the defendant, through the resident inspector, forwarded proposed final estimate on January 21, 1943. On January 28, 1943, plaintiff's superintendent, Mr. Bernard Gabriel, went to the office of the District Engineer at Syracuse, New York, and conferred with a representative of that official concerning claims for additional payments on various contract items including sheeting and shoring. Following this conference, the plaintiff received a letter dated February 1, 1943, from the District Engineer in which it is stated that:

"In computing pay quantities the following methods were used by this office.

"Sheeting—Computations based on field measurements of length and height of sheeting placed."

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21. The plaintiff was paid at the rate of 65 cents per square foot for 10,152.1 square feet of sheeting and shoring. Of this amount 6,738.2 square feet was for the protection of the work, and 3,413.9 square feet was for the protection of property. The plaintiff claims that it should have been paid for 32,899 square feet, 8,094 square feet for the protection of the work, and 24,805 square feet for the protection of property.

As to the sheeting and shoring required for the protection of the work, it is plaintiff's position that the protected area was the area of side walls of trenches excavated where sheeting was placed.

The difference between the quantity of sheeting and shoring for the protection of the work claimed by the plaintiff and that allowed by the defendant is shown by defendant's Exhibit 22, which is in evidence and made a part hereof by reference, to relate to items A 1 and A 2. On all other items concerning sheeting placed for protection of the work, the allowance was as great or greater than that claimed, except for 50 square feet of sheeting claimed at the Walnut Street Bridge, which the defendant allowed under sheeting placed for the protection of property. The evidence is not satisfactory as to the measurements by which either the amount claimed or allowed was computed.

As to the sheeting and shoring required for the protection of the property, plaintiff's claim is based not upon the amount of sheeting or shoring placed, but rather upon the ground area covered by the buildings and structures so protected. The ground area of the buildings and structures which was protected by sheeting and shoring is shown below:

*Ground area of buildings and structures as to which sheeting and shoring was provided*

| | | *Square feet* |
|---|---|---|
| Brand Building | 175 x 68 | 11,900 |
| Hygeia Wall | 315 x 6 | 1,890 |
| Garage (Main St.) | 54 x 60 | 3,240 |
| House (Connolly Ave.) | 35 x 25 | 875 |
| Florist Shop (Walnut St.) | 30 x 30 | 900 |
| Greenhouse (Walnut St.) | 240 x 25 | 6,000 |
| Total | | 24,805 |

22. The plaintiff on February 9, 1943, wrote to the District Engineer requesting that the defendant recompute the allowance for sheeting and shoring.

"* * * by ascertaining the square footage of the area protected by the work performed under this item, pursuant to paragraph 3-06 subdivision (c) and that we be paid therefor at the unit price of said item. * * *"

The defendant reviewed plaintiff protests and on February 18, 1943, wrote plaintiff that the item had been measured and computed in strict accordance with the provisions of the contract

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specifications, and the contractor was invited to present additional facts or computations for consideration.

23. The plaintiff failed to accept this invitation but rather by letter dated February 24, 1943, returned a final release of claims wherein was listed an exception to the method of computing the final quantity of sheeting and shorting.

24. Receipt of the release was acknowledged by letter dated March 5, 1943, and the plaintiff was advised of his further rights of appeal under Article 15 of the contract.

25. On March 19, 1943, plaintiff appealed the decisions of the contracting officer to the Secretary of War, and on July 31, 1944, the appeal was denied. This denial reads in part as follows:

31 "You allege that the method used by the contracting officer in computing the pay quantities for sheeting (including shoring) was incorrect. Paragraph 3–06 (c) of the contract specifications states that sheeting and shoring, '* * * will be measured by the square foot of protected area.' The record shows that the pay quantities of sheeting placed adjacent to existing structures were determined by measurements to specific payment lines where such lines are shown on the drawings. Where specific payment lines were not indicated, the quantities were computed by using the length of the area actually sheeted and the difference in elevation between the top of the sheeting and the bottom elevation of the adjacent structures. The pay quantities for sheeting not placed adjacent to any existing structure were computed by multiplying the difference in elevation between the ground surface and the bottom elevation of the trench by the length of the area sheeted. You assert that because of the liability imposed by paragraph 1–14 (b) of the specifications for damages to structures in or adjacent to the work, including damages caused by disturbance of foundations, that the term 'protected area' as used in paragraph 3–06 (c) must be construed to mean the ground area occupied by the adjacent structures and that the computation of pay quantities for sheeting placed to protect such structures must be based on the area thereof. As noted above the payment lines shown on the drawings for sheeting and shoring placed adjacent to the structures clearly indicate that the parties did not intend that payment should be made on the basis of the ground area of the buildings. Furthermore, the estimates [sic] pay quantity of sheeting was only 9,200 square feet, approximately 10% less than the quantity of 10,152 square feet for which payment was made and only about 30% of the quantity for which payment is claimed. The contract does provide, as contended by you, that the quantities specified are only estimates. However, the buildings which were to be protected were clearly indicated on the contract drawings. The combined ground area of the buildings

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alone, aside from the other locations where the plans indicated sheeting was to be placed, is about 2½ times the total area for which it was estimated sheeting would be required. The payment lines indicated on the drawing and the discrepancy between the ground area of the buildings and the estimated quantity of the sheeting should have put you on notice that the Government did not intend that the pay quantities of sheeting and shoring placed adjacent to existing structures would be computed on the
32 basis of the ground area of such structures. No objection has been made of the method employed by the contracting officer in computing pay quantities for sheeting not placed adjacent to structures. As the ground area occupied by a structure has no direct relation to the cost of placing sheeting and shoring adjacent to it, there would appear to be no reason to compute the pay quantities of sheeting placed adjacent to such structures on the basis of the ground area occupied and to compute the pay quantities of sheeting not so placed on an entirely different basis. Under paragraph 1–14 (b) of the specifications you are liable for damages to land as well as to structures. If your contention that the pay quantities of sheeting placed adjacent to existing structures must be computed on the basis of the ground occupied by said structures were to prevail, it would logically follow that the pay quantities for sheeting not placed adjacent to any existing structure should be computed on the basis of the land area protected, even though such area might conceivably comprise many acres. Such as [sic] interpretation is obviously absurd. It is my finding that the methods employed by the contracting officer for computing the pay quantities of sheeting and shoring were correct."

CONCRETE FINISHING

26. Article 15 of the contract provides as follows:

"Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

Section 1–20 of the general provisions of the contract specifications provides:

"1–20. Claims, Protests, and Appeals.—(a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the

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contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections.
33 The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Chief of Engineers, whose decision shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, ruling, instructions, or decisions of the contracting officer shall be final and conclusive.

"(b) The Chief of Engineers has been designated by the Secretary of War as his duly authorized representative to make final decision and to take other action where the terms of the contract require that such decision or action shall be 'by the Head of the Department concerned or his duly authorized representative.' All appeals from decisions of the contracting officer authorized under the contract shall, therefore, be addressed to the Chief of Engineers, U. S. Army, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract."

Pertinent provisions of the contract specifications, Section VII, dealing with the subject "Concrete" are quoted below:

Section VII. Concrete

* * * * *

"7.03. Proportioning and Mixing.—* * *

"(b) Proportioning. * * *

"(2) Control.—The exact proportions of all material entering into the concrete shall be as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the actual amounts of all material entering into the concrete. The proportions will be changed whenever, in the opinion of the contracting officer, such change becomes necessary to obtain the specified strength and the desired density, uniformity and workability, and the contractor will not be compensated because of such changes, except for an increase in the specified minimum unit paste content, as provided herein as follows: In the event it is determined by the contracting officer that concrete of the desired quality cannot be obtained with the

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specified gradation of aggregates conforming fully to the specifications and the specified minimum unit cement content,
34 he may direct an increase in the unit paste content by the addition of Portland cement, in which case compensation will be made therefor at the cost to the contractor of the cement delivered f. o. b. carrier at the site of the work, plus $0.40 per barrel.

* * * * *

"7-05. Details of Construction.—(a) Forms.—* * *

"(4) Removal.—Forms shall not be removed without the approval of the contracting officer, and all removal shall be accomplished in such manner as will prevent injury to the concrete. Forms shall not be removed from walls and vertical faces before the expiration of 2 days, except when specifically authorized by the contracting officer. When, in the opinion of the contracting officer, conditions on the work are such as to justify it, forms may be required to remain in place for longer periods.

* * * * *

"(d) Finishing.—Immediately following removal of forms, all form tie holes shall be filled, protruding fins or other surface irregularities removed by carborundum stone and all other defects repaired. Where necessary to obtain a suitable surface finish, the contractor shall remove the forms and finish the sufaces when and as directed by the contracting officer at no additional cost to the United States. The curing specified in subparagraph 7-05 (e) following shall be temporarily suspended during such repairing or finishing as directed. The finished surfaces shall be free from sand streaks or other defects and the plastering over of such surfaces will not be permitted. Defective concrete shall be repaired by cutting out the unsatisfactory material and placing new concrete which shall be formed with keys, dovetails, and anchors to attach it securely to the other work. This concrete shall be drier than the usual mixture and shall be thoroughly tamped into place. All surfaces of concrete, not covered by forms, that are not to be covered by additional concrete or backfill shall have a wood float finish without additional mortar, and shall be true to elevations as shown on contract drawings. Striking-off and finishing shall follow closely the placing operation in order to insure completion before the initial set has taken place. The contractor will not be permitted to start a pour unless a sufficient number of qualified finishers are available to fulfill the above requirements. Care shall be taken to see that all excess water is removed before
35 making the finish. Other surfaces shall be brought to the specified finished elevation and left true and regular as approved by the contracting officer. Where considered necessary

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by the contracting officer, or where indicated on the drawings, joints shall be made carefully with a jointing tool. Every precaution shall be taken by the contractor to protect finished surfaces from stains or abrasions. No fire shall be permitted in direct contact with any concrete at any time. Concrete surfaces or edges likely to be injured during the construction period shall be properly protected by leaving the forms in place or by erecting covers satisfactory to the contracting officer."

27. Section 1, paragraph 1–11, Work Covered by Contract Price, provides as follows:

"1–11. Work Covered by Contract Price.—The contractor shall, under the contract prices, furnish and pay for all materials, equipment, and labor for all permanent, temporary, and incidental work, furnish all accessories, and do everything which is necessary to carry out the contract in good faith, which contemplates everything completed, in proper working order, of good materials with skillful workmanship, accurately fitted, properly assembled, and connected."

28. The placement of concrete began on August 20, 1941, and placement was made from time to time during that construction season until October 24, 1941. During this time monoliths Nos. 1 through 17 were poured. The first concrete which was placed above the foundation and as to which the plaintiff's claim for finishing relates was commenced on September 5, 1941.

29. From the time that the forms were stripped from the exposed concrete lifts above the foundation, the defendant's field representatives complained to Mr. Gabriel, plaintiff's superintendent, of the poor faces on the exposed concrete. After monoliths Nos. 1 through 17 had been poured and the forms stripped from the concrete, there were rust stains showing from the water pipes used in curing, and the concrete faces showed numerous blemishes, pockmarks and honeycombs. Protruding fins had not been removed, and the form tie rods holes had not been filled.

30. Prior to October 29, 1941, defendant complained to plaintiff regarding the tie holes not being plugged as re-
36 quired by paragraph 7–05 (d) of the contract specifications.

31. Under date of July 28, 1941, plaintiff transmitted to defendant some revised prints covering certain form details in the construction of the wall and which made reference to the proposed use of certain porcelain tubes or cylinders for the purpose of putting bolts through said porcelain cylinders which could act as spreaders and thereby increase or lessen the width of the forms.

32. Defendant, by letter dated August 4, 1941, approved plaintiff's revised prints subject to certain provisions which in part provided:

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"(e) The approval as indicated above is predicated on producing a finished concrete surface as contemplated in contract specifications, and the right is reserved to require necessary revisions in your form construction to provide uniform finished surfaces on all exposed faces."

33. On October 15, 1941, defendant objected to the further use by plaintiff of visible porcelain tubes which gave the appearance of an unfinished job.

34. Under date of November 15, 1941, defendant wrote plaintiff regarding the unused porcelain tubes and therein stated that plaintiff would be allowed to use these tubes on unexposed concrete wall surfaces and would be paid for the remaining unused porcelain tubes.

35. The defendant has allowed payment for porcelain tubes which were delivered by plaintiff to defendant but not used on the job.

36. On October 20, 1941, the contracting officer addressed and forwarded the following letter to the plaintiff:

"Reference is made to Par. 7-05 (d), Finishing of Concrete Surfaces, of your Contract No. W-321-eng-261 for the construction of the Elmira Flood Protection Project, Section 1.

"I have examined the concrete work constructed to date under your contract and find that it has not been finished in accordance with the provisions of the contract specifications. You are directed to correct these deficiencies at once. My field representatives will indicate the defective work and furnish details of the required corrective measures."

37 37. By letter dated October 29, 1941, defendant's Resident Engineer forwarded a detailed statement of corrective measures to be taken by the contractor in two parts, the first relating to the treatment of monoliths Nos. 1 through 17 which had then been placed, and the second relating to the treatment of concrete which had not then been placed. The detailed statement of corrective measures provides as follows:

"METHOD OF TREATING EXISTING WORK

"The surface to be treated will be scrubbed with a wire brush where necessary to clean out defective areas.

"Mix one part portland cement with two parts fine sand (similar to that used on the project from which particles retained on the No. 16 sieve has been removed) with water sufficient to produce a grout having the consistency of very thick paint. If necessary, white portland cement shall be added, replacing an equal quantity of standard cement, in a quantity sufficient to give a color equal to the concrete in the project. A test of the procedure and color will be made on a panel which is to be covered

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with backfill. This mixture shall be carefully worked out so that no difference in color will result from the grout. This mixture shall be allowed to set for 45 minutes before being used. The surface of the concrete to be treated shall be thoroughly wet, after which the grout shall be applied with a brush or cloth completely filling air bubbles and holes. Immediately after applying the grout scour the wall vigorously with a cork or wood float. The grout shall then be allowed to set partially for an hour or two, depending on the weather, until it has hardened sufficiently so that it can be scraped from the wall with the edge of a steel trowel without removing the grout from the small air holes. Next allow the surface to dry thoroughly one to two hours or more depending on the weather until the initial set occurs and rub it vigorously with a burlap bag to completely remove any dried grout. There shall be no visible film of grout remaining after this rubbing. The entire cleaning operation for any monolith shall be completed the same day it is started. The entire exposed surface of the monolith shall be treated in this manner. If any dark streaks or spots remain after this operation they shall be rubbed lightly with a fine carborundum stone. This rubbing must be carefully done to avoid changing the texture of the concrete.

38 "After the grout has become thoroughly set (24 hours in warm weather and 48 hours in cold weather) curing will commence and continue for at least seven days. Curing shall be accomplished by covering finished surfaces promptly with damp burlap or cotton quilts. (Heating will not be necessary on old walls.)

"METHOD OF TREATING NEW CONCRETE WORK

"The forms on work that is to be exposed shall be removed as soon as it is possible to do so without injury to the concrete. In warm weather (minimum 65° F., average 75° F.) this will be approximately 24 hours after the completion of placing. In colder weather the forms should be allowed to remain in place approximately 48 hours.

"Immediately after the forms have been removed all fins or other projections shall be broken off with a carborundum stone or other suitable tool which will remove the projections without marring the surrounding surfaces. Filling of form tie holes shall be concurrent with the removal of fins, etc. This operation shall be separate from general finishing and shall be accomplished with retempered mortar. This mortar shall have the same sand-cement ratio as the concrete in the original work. Sufficient water shall be added to make a dry mixture. This mortar shall be thoroughly mixed, allow to set for one hour and then remixed before being used. The material shall be thoroughly tamped

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into the tie holes and care shall be taken not to smear or deface the surrounding surfaces. Other patching of honeycomb or similar defects shall also be accomplished with sand-cement mortar as described above. All patches shall bond with the steel reinforcement and shall, if feasible, be dovetailed to the existing work. Dish shaped patches with sloping sides shall not be permitted.

"Upon completion of repair work as outlined above, the entire exposed surface shall be treated as follows:

"A thin sand-cement mortar shall be applied to the entire surface with a steel trowel. This mortar shall be composed of one part cement and two parts sand to which water shall be added until the mortar has the consistency of very thick paint. If necessary, white cement shall be used replacing an equal quantity of regular cement so that the dry mortar will have the same color as the concrete in the structure. Panels shall be experimented with on concrete surfaces which will be covered in order to assure this similarity in color. This application shall be sufficiently
39 vigorous to insure the complete filling of all pock marks or other blemishes. The sand for this mortar shall be the sand as regulaly [sic] used in the concrete work except that the sizes retained on a No. 16 sieve shall be removed. The mortar applied to the concrete surface shall be allowed to set for one hour and the surplus shall then be removed by scraping the surface lightly with the edge of a steel trowel or steel float. After the lapse of sufficient time to allow initial set or hardening of the mortar, the surface shall be vigorously rubbed with Clean Dry Burlap which shall entirely remove the mortar on the surface of the concrete. Initial curing shall be commenced immediately after this operation and shall consist of covering the finished surface with Clean Wet Burlap. Normal water curing will commence 12 hours later. Finishing of concrete surfaces shall be completed in the minimum possible time and in no case shall the finishing be extended over more than a 12 hour period. (This is specified because the color of the finished surface may vary with atmospheric conditions and make blending with adjacent finished surfaces difficult.)"

38. Upon receipt of the letter and its enclosure referred to in the foregoing finding, the plaintiff on October 31, 1941, addressed the following letter to the contracting officer:

"Receipt is acknowledged of your letter of October 29th relative to certain finishing which you desire us to do on the concrete already placed on this project. It seems wise at this time to review briefly, for the record, the procedure which has previously taken place and which must therefore be responsible for the appearance of these concrete walls. Before reviewing this procedure, let me state that we are already proceeding to do as directed in your

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letter of October 29th, and that we will at all times proceed with any of your instructions, our desire, however being, of course, that we be protected insofar as the matter of reimbursement to us, for any expenses plus normal profit incurred in carrying out any such instructions, is concerned.

"The aggregates used in the Elmira work, gravel, sand, and cement, were all previously approved by your representatives and accepted for this work. The water is the same as that used by the people of Elmira for drinking water and has also been approved by your representatives. The characteristics of the mixture, insofar as the porportion [sic] of the component parts, was set by your representatives after exhaustive tests on their part. The form lining used was approved by your representatives and the forms themselves compare in construction very favorably as to strength, appearance, etc., with any used in the district, and this we have on the authority of the Acting Chief of Operations. We come, therefore, to the mixing and placing of the concrete, and at all times these procedures have been directly and completely under the control of your representatives. No latitude has been allowed us for the carrying out of any opposing ideas we may have had in this work, ideas which may or may not have secured a better result, but in any event we were not allowed to try them out. We must, therefore, in view of all the above, respectfully suggest that the responsibility for any result which may not appeal to you, does not lie on our shoulders.

"It is our understanding that costs are being kept by your representatives as well as by ourselves on the additional expense that is now accruing because of the finishing operations which you have directed, and that on the conclusion of these operations a satisfactory settlement will be reached to reimburse us for this expense. If this understanding is not in accordance with yours, we should appreciate being advised at once.

"Your consideration and advice on all the above will be appreciated."

39. After monoliths Nos. 1 through 17 were treated in accordance with the procedure outlined for existing work, the plaintiff submitted on November 27, 1941, a request for the payment of the sum of $864.07 covering the cost of such work. This sum resulted after an allowance of $111.75 had been deducted as the cost of filling form tie rod holes.

On December 10, 1941, the contracting officer by letter acknowledged receipt of the above letter and stated as follows:

"I find that the finishing treatment required on your job is well within the intent of paragraph 7–05 (d), and I cannot consider additional payment for this work."

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Following receipt of the above letter, Mr. Fred Davis, vice president of plaintiff, conferred with the District Engineer on December 15, 1941. After this conference, the plaintiff addressed the following letter to the contracting officer:

"As a result of a conference held this morning with the District Engineer, Mr. Samples, and myself, my understanding of the conclusions reached at this conference is outlined below.

"1. I understand that our company is not giving up any of
41 our rights to future consideration of our claim for the cost of the treatment of the walls constructed during 1941 by reason of not appealing at this time the decision of the District Engineer outlined in his letter of December 10th.

"2. That consideration will be given to payment by the United States for any increase in our costs because of any change in the kind of aggregates composing the concrete mixtures or because of any change that may be prescribed in handling the concrete.

"3. That the treatment of the walls in the future will be modified, in that treatment will be required only on the land side of the walls except that at bridge approaches where treatment shall be on both sides of the walls for a distance of three or four monoliths from the bridge approach; such treatment shall immediately follow the removal of the forms and shall consist of rubbing the concrete with carborundun [sic] stone and brushing with a light coat of mortar if required. It will also, of course, be necessary for us to block the holes at the form tie rods.

"We would appreciate knowing as to whether your understanding is in general accordance with the above."

40. The contracting officer replied by letter of December 29, 1941, as follows:

"Reference is made to your letter dated December 15, 1941, regarding your understanding of conclusions reached at a conference in my office on December 15, 1941, on concrete construction at the Elmira Flood Protection Project, Section No. 1, Contract No. W-321-eng-261.

"Using the same numerical index as used in your letter you are advised that conclusions reached in the conference were as follows:

"1. Your right of appeal from my decision on payment for wall treatment is established in Article 15 of the contract.

"2. Any redesign of concrete mixtures or required changes in methods of handling concrete not within the scope of specifications which causes increased cost will be cause for consideration of increased payments to you.

"3. Treatment of walls will be required on the landside of all walls and on the streamside of walls approximately 100 feet upstream and downstream of all bridges, approaches, or other similar places where relatively close scrutiny is easily attained. In

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addition to the above treatment regular patching of tie rod holes, replacing unsatisfactory spots, repair of honeycombs, etc.,
42 will be required on all surfaces in accordance with specification requirements."

41. On February 9, 1943, the plaintiff filed a protest with the contracting officer listing five items of claim but not including the claim for concrete finishing. This was replied to by letter of February 18, 1943, by the contracting officer, in which the following statement is made:

"In view of the fact that your letter and this reply are repetitions of previous protests and decisions, and that no progress is apparent in the settlement of this dispute, it is suggested that, in event you elect to prosecute this matter further, you arrange to present detailed facts, computations, etc., either by letter or at a conference in this office."

On February 24, 1943, the plaintiff forwarded an executed copy of a release dated February 19, 1943, a copy of which is in evidence as plaintiff's exhibit 7 and made a part hereof by reference. In this release, the plaintiff excepted a claim by reason of concrete finishing operations

"* * * in a manner and to an extent not required by the contract plans and specifications. * * *"

The plaintiff suggested in the letter transmitting the release that $100 be withheld from payment due it on its final estimate. In this letter the plaintiff also discussed the concrete finishing claim and protested the sums allowed for the concrete items in the final estimate and requested an opportunity to submit detailed data as to the cost of performing this "additional" work.

42. The contracting officer on March 5, 1943, sent the following letter to plaintiff:

"Receipt is acknowledged of your letter dated February 24, 1943, transmitting executed copies of standard release form for Contract No. W-321-eng-261, and an application for reconsideration of a previous appeal, addressed to the Chief of Engineers, relative to minimum wage rate.

"Reference is made to the exceptions listed in your formal release to Contract No. W-321-eng-261, and you are advised, as follows, as to the action taken by this office relative to the various claims.

"(a) The decision relative to additional payment for
43 work in connection with treatment of concrete surfaces, was given in letter from this office dated December 10, 1941. Reference is made to letter from this office dated December 29, 1941, informing you of your right to appeal the decision of this office as established in Article 15 of the contract. As no appeal



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was made as per Article 15 of the contract, it is considered that your right to appeal has been forfeited.

"(b) A decision relative to the other exceptions to the release; namely, payment of Sheeting (Including Shoring) Contract Item No. 7; payment of Copper, Contract Item No. 28, and payment of Contract Item No. 6, Removal—Walls, Slabs, Paving, Building Foundations (Concrete or Masonry) was given in letter from this office dated February 18, 1943.

"Your right of appeal from my decision on payment of the items covered in paragraph (b) above is established in Article 15 of the contract. The time allowed for appeal will expire thirty days from date of this letter.

"You are further advised that a voucher is being prepared for your signature for the partial estimate now due, less $100.00, as requested in your letter of February 19, 1943."

43. The plaintiff on March 19, 1943, appealed the decision of the contracting officer of February 18, 1943, and claimed in addition to the sheeting and shoring item and other items not here material, a concrete finishing item of $7,082.74 of which $862.42 was claimed for the finishing of monoliths Nos. 1 through 17 as to which the detailed statement of corrective measures related to the Method of Treating Existing Work, and $6,220.32 was claimed for the finishing of all other work as to which finishing was performed pursuant to the Method of Treating New Concrete Work contained in such detailed statement.

The contracting officer on June 2, 1943, forwarded his findings of fact on the plaintiff's claim to the Chief of Engineers. So far as here material, this finding of fact provides as follows:

"4. With reference to finishing concrete surfaces (paragraph 3a above), the contractor was required, in accordance with the contract specifications, to finish exposed concrete wall surfaces. The contractor offered verbal and written protests all of which were duly considered prior to the District Engineer's decision dated December 10, 1941 (Exhibit F), which denied the contractor's request for additional payment. After a conference in
44 the District Engineer's office on December 15, 1941, the contractor forwarded the letter of the same date which he quotes on page 8 of his appeal. The District Engineer in turn with letter dated December 29, 1941 (Exhibit G), replied to the contractor's letter of December 10, 1941, and denied his request for additional compensation. The contractor was advised of his further rights of appeal under Article 15 of the contract. Records of this office do not disclose any further correspondence on this item of complaint prior to receipt of the final release (Exhibit Q), which was returned with letter dated February 24, 1943 (Exhibit D)."

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On April 29, 1944, the contracting officer forwarded a supplement to his findings of fact dated June 2, 1943, to the Chief of Engineers. It provided as follows:

"1. The following facts concern that portion of the contractor's appeal pertaining to the finishing of concrete surfaces and is supplementary to the facts presented in paragraph four of Findings of Fact, dated 2 June 1943.

"2. Operations under the subject contract were commenced on 3 June 1941. Placement of concrete commenced on 19 August 1941 and a total of 955 cubic yards of Class A concrete, Item 20, was placed through 24 October 1941, the date concrete operations were suspended for the winter season. During the first season the contractor after the removal of forms did not attempt to patch holes or remove surface irregularities from the exposed concrete surfaces as required by paragaph 7–05d of the contact specifications. The District Engineer on 15 October 1941 inspected the site of the work and verbally directed that immediate action be taken to remedy the unsightly condition presented by the unfinished concrete surfaces. The contractor was formally directed by letter dated 20 October 1941 (attached as Inclosure No. 1) to correct the surface deficiencies in a manner to be indicated by the resident engineer. The resident engineer by letter dated 29 October 1941 (see page 10 of contractor's appeal) furnished the contractor a complete set of instructions for the guidance of the contractor. Two procedures were outlined; the first pertained to finishing concrete placed and cured under the contract prior to the issuance of said instructions, the second procedure outlined a more timely method of finishing to be applied on subsequent work. The contractor complied with the instructions as outlined and by letter dated 27 November 1941 (attached as Inclosure No. 2) pre-
45 sented a bill in the amount of $864.07 for finishing 5,330 sq. ft. of concrete surface. The District Engineer by letter dated 10 December 1941 (Exhibit F of Findings of Fact) denied the contractor's request for additional payment on the grounds that the work performed was within the intent of the specification. The subsequent history is as outlined in paragraph 4 of the original Findings of Fact dated 2 June 1943."

44. Thereafter on June 19, 1944, the plaintiff filed with the Chief of Engineers a memorandum in further support of its appeal.

45. The Acting Chief of Engineers by letter of July 31, 1944, forwarded to plaintiff his decision denying the plaintiff's appeal which provided in pertinent part as follows:

"You claim additional compensation in the amount of $7,082.74 for finishing concrete in a manner allegedly not required by the contract specifications. It is not now contended by you that an

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appeal was taken within thirty days from the date of the contracting officer's decision denying your claim in the amount of $862.42 for finishing concrete erected in 1941 as required by paragraph 1–20 of the contract specifications. Thus further consideration of this item is precluded. In regard to the item of $6,220.32 for finishing concrete erected in 1942, the only question involved is whether instructions issued by the Contracting Officer for said work exceed the requirements of the contract. An examination of the applicable provisions of the specifications and the instructions issued by the contracting officer clearly show that the claim for this item was properly denied. Paragraph 7–05 (d) of the specifications requires you to finish the concrete surfaces, '* * * as directed by the contracting officer * * *' without any compensation in addition to that provided in the contract unit prices for concrete. This provision does not obligate you to comply with arbitrary instructions issued by the contracting officer. It does require you, however, to comply with any reasonable instructions of the contracting officer and to finish the concrete in a sightly and workmanlike manner. The instructions issued by the contracting officer for finishing 'new concrete work' are reasonable and represent the minimum requirements for a workmanlike job. Your appeal for additional compensation for finishing concrete is therefor denied."

A reconsideration of the appeal was thereafter requested on behalf of the plaintiff and on October 1, 1946, the Chief
46 of Engineers reaffirmed the action by the Acting Chief of Engineers of July 31, 1944, referred to above.

46. The plaintiff appealed the decision of the Chief of Engineers to the War Department Board of Contract Appeals. The president of this Board on January 10, 1947, as the Authorized Representative of the Secretary of War, dismissed the appeals following the decision of the Board which found that it had no jurisdiction to entertain them.

47. On monoliths Nos. 1 through 17, 5,330 square feet of concrete surface was treated in accordance with the direction of the contracting officer. The plaintiff by its letter of November 27, 1941, claimed a total of $864.07 for such surface treatment, itemized as follows:

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*Labor*

Oct. 27/41 to and incl. Nov. 18/41

| | |
|---|---|
| 124 hours @ $1.50 per hour | $186.00 |
| 127 hours @ $1.25 per hour | 158.75 |
| 522.5 hours @ $0.75 per hour | 391.87 |
| 20 hours @ $1.87 per hour | 37.40 |
| 5 hours @ $2.25 per hour | 11.25 |
| 6 hours @ $0.80 per hour | 4.80 |
| 4 hours @ $1.125 per hour | 4.50 |
| Total labor | 794.57 |
| Less clean and plug form tie rod holes, 149 hrs, @ $0.75 per hour | —111.75 |
| Balance due a/c labor | 682.82 |
| Rent of scaffold (swinging) | 18.00 |
| Material of built scaffold | 15.00 |
| 2 carborundum stones | 2.50 |
| 2 trowels | 1.70 |
| 3 wire brushed [sic] | 1.80 |
| 2 plaster brushes | 2.10 |
| 2 bags cement | 1.19 |
| 1 bag cement (white) | 2.50 |
| 0.2 ton sand | 0.40 |
| Compension [sic] and other insurances @ $8.423 per hundred dollars of pay roll | 57.51 |
| Total labor, material and accessories | 785.52 |
| 10% on the above to allow for overheads and profit | 78.55 |
| Total | 864.07 |

47 No proof of damages relating to the claim was made other than the claim itself.

48. The plaintiff claims as the extra cost to it of the concrete finishing during 1942, in accordance with the directions of the contracting officer relating to new work, the sum of $6,070.19 itemized as follows:

| | |
|---|---|
| Labor | $5,934.64 |
| Material | 100.00 |
| Small tools | 50.00 |
| Compensation, P. L. & P. D., $7.24 per H. of P. R | 429.67 |
| State unemployment, 2.7% | 160.24 |
| Social Security, 1% | 59.35 |
| Total | 6,733.90 |
| Profit, 10% | 673.39 |
| Total | 7,407.29 |
| Chargeable to work as called for in the specifications, 27,944 S. F. @ $.05 per S. F., incl. all insurances, bonds, profit, etc. | 1,397.20 |
| Balance | 6,010.09 |
| Bond | 60.10 |
| Total Claimed, 1942 | 6,070.19 |

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It is noted that in the computation above a credit of five cents per foot is allowed by plaintiff as the cost which it feels is properly chargeable to it for the finishing according to the contract specifications.

Excepting such credit shown, the entire claim is based upon labor cost and other costs in turn based upon the cost of labor with the further exception of $150 for material and labor. Since as the secretary of the plaintiff testified, certain original pay roll records have been lost due to some cause beyond his knowledge, it is not possible to verify the extra cost of concrete finishing in 1942 relating to new work.

Respectfully submitted.

WILLIAM E. DAY,
*Commissioner.*

49 *Proceedings following filing of Commissioner's report*

On August 24, 1951, plaintiff filed a motion for leave to amend the petition.

On September 4, 1951, the court entered the following order on said motion:

"Motion to amend petition allowed insofar as it modifies or increases the amounts claimed, and overruled otherwise."

On December 5, 1951, plaintiff filed its first amended petition, which is as follows:

51 In the Court of Claims of the United States

[Title omitted.]

*First amended petition*

Filed December 5, 1951

*To the Court of Claims of the United States:*

The amended petition of the plaintiff respectfully represents that:

I

1. The plaintiff is, and at all times hereinafter referred to was, a corporation organized and existing under the laws of the State of New York, with its principal place of business in Binghamton, New York.

2. The plaintiff has, at all times, borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government.

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52 3. On or about March 29, 1941, the United States Army Engineer Office at Binghamton, New York, invited bids for the construction of Flood Protection Project (Section No. 1) along the right bank of the Chemung River within the limits of the City of Elmira, Chemung County, New York. The plaintiff, in response to such invitation, submitted a bid in the fixed amount of $232,669.30 which, on April 29, 1941, was accepted. Pursuant to such bid and acceptance, there was subsequently executed Contract No. W-321-eng-261, dated May 14, 1941 (hereinafter referred to as the "contract"), a copy of the material portions of which is annexed hereto. Such contract was an authorized and binding obligation of the defendant.

## II

4. Under the provisions of the Act of August 30, 1935, 49 Stat. 1011—the so-called Davis-Bacon Act—the contract was required to, and did, contain a provision obligating the plaintiff to pay not less than the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the territorial area in which such work was to be performed. In the Specifications for the work covered by the contract, which Specifications, dated March 29, 1941, were issued as of the date thereof in connection with the advertisement for bids as the basis upon which such bids were to be made, and which were appended to and made a part of the definitive contract, the representation was made that the Secretary of Labor had determined the prevailing wage rates in the locality; and such rates were set forth in Paragraph 1-31 of the Specifications. Among the rates so given were the following:

53

| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.00 |
| * * * * * | |
| Laborers, unskilled | .50 |
| Laborers, concrete puddlers | .50 |
| * * * * * | |

5. The plaintiff, acting on the basis of the wage rates stated in the Specifications, as it was invited and entitled to do, computed and submitted its bid. Subsequent to the acceptance of such bid and after the execution of the definitive contract, the plaintiff discovered that the wage rates for the classifications of labor referred to above in Paragraph 4 were not in fact the prevailing rates for such labor as determined by the Secretary of Labor, neither as of the time of the issuance of the Specifications, the

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acceptance of the bid, nor the execution of the contract; and that the Secretary of Labor in at least one instance, namely, on March 4, 1941, had determined the prevailing wage rates in the locality for these classifications of labor on a similar project to be higher than those stated in the Specifications of March 29, 1941, as follows:

| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.125 |
| * * * * * | |
| Laborers, unskilled | .55 |
| Laborers, concrete puddlers | .55 |
| * * * * * | |

Such determination of the Secretary of Labor was still in effect and unmodified on March 29, 1941, and the Specifications issued by the defendant on such latter date were defective and misleading in failing to reflect such determination.

54 6. Upon commencing work under the contract, the plaintiff was unable to procure labor of these classifications at the rates stated in the Specifications, and was in fact obliged to pay higher rates, as follows:

| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.125 |
| * * * * * | |
| Laborers, unskilled | .625 |
| Laborers, concrete puddlers | .625 |
| * * * * * | |

7. The plaintiff was entitled to, and did, rely upon the wage rates stated in the Specifications as being in accordance with the most recent determinations by the Secretary of Labor of the wage rates prevailing for the corresponding classes of workmen on similar projects in the area; and was entitled to, and did, prepare and submit its bid on this assumption. When, after the acceptance of its bid and the execution of the contract, it discovered the error in the representations made to it, it was entitled to be reimbursed at the higher rates which it was required to pay in order to perform the contract work, to the extent that such higher rates were equivalent to the prevailing rates fixed by the Secretary of Labor in her determination of March 4, 1941. The plaintiff duly requested such reimbursement by appropriate adjustment in the contract price, but the defendant wrongfully denied such request.

8. The failure of the defendant so to adjust the contract price has resulted in injury and damage to the plaintiff in the amount of $9,525.44, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

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III

9. The 62½¢ hourly wage rate with respect to laborers (both unskilled and concrete puddlers) which the plaintiff was obliged in fact to pay in order to procure labor to perform the contract work was, in fact, the prevailing hourly rate in the locality at the time of the issuance of the Specifications, the acceptance of the bid, and the execution of the contract; and the 55¢ rate fixed in the Secretary of Labor's determination of March 4, 1941, was less than the actual prevailing rate at such times. The failure of the defendant to make an accurate representation in the Specifications to the plaintiff with respect to the hourly rate actually prevailing at the time of the issuance of the Specifications, was a breach of the defendant's obligation to state such prevailing rates correctly and not to mislead the plaintiff by representing that the prevailing rates were lower than they were in fact. Because of the fact that the plaintiff was obliged to pay the 62½¢ prevailing rate in order to procure labor to perform the contract work, the plaintiff was entitled, in addition to the claim hereinabove described under Section II, to be further reimbursed for the difference between the 55¢ rate for laborers fixed in the Secretary of Labor's determination of March 4, 1941, and the 62½¢ hourly rate actually prevailing at the time of the issuance of the Specification, the acceptance of the plaintiff's bid, and the execution of the contract, which 62½¢ rate the plaintiff was required to, and did, pay. Plaintiff duly requested such reimbursement but the defendant wrongfully denied such request.

10. The failure of the defendant to make such reimbursement has resulted in injury and damage to the plaintiff in the amount of $6,071.94, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

56

IV

11. Paragraph 7–05 (d) of the Specifications contained a detailed description of the manner in which, and the materials with which, the concrete involved in the construction was to be finished. In submitting its bid, the plaintiff was entitled to, and did, rely upon the statements made in said Paragraph 7–05 (d) in computing the cost to it of finishing such concrete. During the performance of the contract, the defendant ordered and required the plaintiff to finish the concrete in a manner and with materials not specified in, or reasonably contemplated by, the Specifications, with the result that plaintiff was subjected to unauthorized and unanticipated costs, reimbursement of which was duly requested by the plaintiff but wrongfully denied by the defendant.

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12. The defendant's wrongful conduct in this respect has resulted in injury and damage to the plaintiff in the amount of $6,934.26, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

V

13. Under the provisions of paragraph 3–06 of the Specifications, the plaintiff was required to furnish certain sheeting and shoring. Subparagraph (c) of said Paragraph 3–06 provided that such sheeting and shoring was to be measured "by the square foot of protected area", and subparagraph (d) of said Paragraph 3–06 provided that payment for sheeting and shoring would be made at the contract unit price of Sixty-five Cents ($0.65) per square foot, as stated in the Schedule of Payments annexed to and made a part of the contract.

57 14. In computing its bid, the plaintiff was entitled to, and did, rely upon the statements contained in Paragraph 3–06 as to the measurement of sheeting and shoring by the square foot of protected area, and computed its bid on the basis of square footage of the area required to be protected. During the performance of the contract, however, the defendant refused to pay the plaintiff for sheeting and shoring in accordance with the square footage of the protected area, and, instead, followed an arbitrary and unauthorized method of measurement, not in accordance with the Specifications, which resulted in the underpayment of the plaintiff for sheeting and shoring. Although the plaintiff duly requested payment of the proper amount as contemplated by the contract, such request was wrongfully refused by the defendant.

15. The wrongful conduct of the plaintiff in this respect resulted in injury and damage to the plaintiff in the amount of $14,785.55, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

VI

16. Although the plaintiff duly and formally protested to the Contracting Officer the wrongful actions complained of above, the Contracting Officer refused to afford the plaintiff any relief, and, upon appeal to the Chief of Engineers, was upheld by the latter. Appeals by the plaintiff to the War Department Board of Contract Appeals were, on January 14, 1947, dismissed for an asserted lack of jurisdiction. Except as hereinbefore referred to in this Paragraph 16, no action on the claims has been taken by Congress or by any department of the government.

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58 17. The plaintiff is justly entitled to recover from the defendant the aggregate sum of $37,317.19, after allowing all just credits and offsets.

18. The plaintiff has made no assignment or transfer of the claims or any part thereof, and no persons other than the plaintiff are owners of the claims or of any interest therein.

Wherefore, it is respectfully prayed that judgment be granted against the defendant and in favor of the plaintiff for the sum of $37,317.19, together with such costs as may be properly allowable to it in respect of this suit.

JEROME BEAUDRIAS,
*Attorney for Plaintiff, Office and Post Office Address, 83–85 Warburton Avenue, Yonkers 2, New York.*

59 [*Duly sworn to by Jerome Beaudrias; jurat omitted in printing.*]

60 [Contract omitted. Printed side page 10 ante.]

64 [Specifications omitted. Printed side page 14 ante.]

71 *Argument and submission of case*

On April 8, 1952, the case was argued and submitted on merits by Mr. Jerome Beaudrias for plaintiff, and by Mr. James J. Sweeney for defendant.

73 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J.*

Filed October 7, 1952

Mr. Jerome Beaudrias for the plaintiff.

Mr. James J. Sweeney, with whom was Mr. Assistant Attorney General Holmes Baldridge, for the defendant.

The Court, upon the evidence, the report of Commissioner William E. Day, and the briefs and argument of counsel, makes the following

*Special findings of fact*

1. Plaintiff is, and at all times material herein has been, a corporation organized and existing under the laws of the State of New York with its principal office and place of business at Binghamton, New York. Since its formation in 1929, it has been engaged in business as a general contractor.

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2. On March 29, 1941, defendant, acting by and through the War Department's Corps of Engineers' Office at Binghamton, New York, invited bids for the construction of Flood Protection Project (Section No. 1) along the north bank of the Chemung River, within the limits of the city of Elmira, Chemung County, New York. In response to said invitation, plaintiff submitted a bid based upon a unit price applied to the various operations involved in the performance of the work in the total sum of $232,669.30. This bid was accepted by defendant on May 14, 1941. On that date plaintiff and defendant entered into a written contract, No W–321–eng–261, which was approved June 3,
74 1941. On June 5, 1941, defendant gave plaintiff a formal notice to proceed with the work. Actual work commenced on the site of the job on June 3, 1941.

3. The contract was performed by plaintiff, and it has been paid the contract price, as adjusted, for change orders with the exception of $100 which plaintiff instructed the District Engineer to withhold, and plaintiff has refused to accept said $100 from defendant on advice of its counsel.

4. Plaintiff sues for the sum of $37,317.19, the total of three separate claims, as follows:

| | |
|---|---|
| Claim for reimbursement of wage rates paid to carpenters laborers, and concrete puddlers | $15,597.38 |
| Claim as regards measuring of sheeting and shoring | 14,785.55 |
| Claim for finishing of concrete | 6,934.26 |
| Total | 37,317.19 |

Each claim will be discussed separately.

WAGE RATES

5. Before bidding, plaintiff was furnished a copy of the specifications. Section 1–31 of such specifications reads, insofar as here pertinent, as follows:

"1–31. Wage and Labor Provisions.—(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.00 |
| * * * * * | |
| Laborers unskilled | 0.50 |
| Laborers, concrete puddlers | 0.50 |
| * * * * * | |

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6. Article 17 of the contract reads as follows:

"ARTICLE 17. Rate of wages (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

75 "(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

"(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby."

7. On October 22, 1940, the Elmira business agent of the United Brotherhood of Carpenters and Joiners of America, Local 532, wrote to the United States Engineer's Office in Binghamton, New York, to inform it that the wage scale for carpenters would be increased as of January 1, 1941, from $1 per hour to $1.125 per hour. On October 29, 1940, the District Engineer acknowledged receipt of this letter.

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8. On January 31, 1941, the Secretary of Labor furnished to the Corps of Engineers at its request, for inclusion in the contract specifications, the schedule of minimum wages in the Elmira area.

Such schedule, which is set out in finding 5, was included
76 in the specifications which were furnished to plaintiff prior to the computation of its bid. As stated in finding 2, invitations for bids were issued on March 29, 1941, and plaintiff's bid was accepted on May 14, 1941.

9. On March 4, 1941, the Secretary of Labor furnished to the Public Buildings Administration of the Federal Works Agency a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira, New York. The prevailing wage rates shown therein, in pertinent part, were as follows:

| *Classification* | *Hourly rate* |
|---|---|
| Carpenters, journeymen | $1.125 |
| Laborers, unskilled | .55 |

10. Plaintiff employed only union labor on this project. At the time plaintiff began work on the site on June 3, 1941, it had to pay $0.625 per hour for laborers and $1.125 per hour for carpenters. The carpenter wage rate had been put into effect by the union on January 1, 1941, and the laborer wage rate on April 1, 1941.

11. On June 16, 1941, plaintiff advised the District Engineer (who was the contracting officer) that the minimum wage rates provided in the contract specifications were less than the rates currently prevailing in the Elmira locality for carpenters, laborers (unskilled), laborers (concrete puddlers), and truck drivers.

12. The District Engineer replied on June 27, 1941, stating that the minimum wage rates were determined in strict accordance with the applicable law and regulations, and that he could not afford relief for any differences between wage rates then prevailing in the area and the minimum rates required by the contract specifications.

13. Plaintiff protested this decision to the Chief of Engineers under date of July 10, 1941, and on August 5, 1941, plaintiff's appeal was denied by the Chief of Engineers in part as follows:

"There is no authority in law for this office to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions of the above cited act [49 Stat. 1011]. Therefore, I find that the wage rates as established by the Secretary of Labor, and incorporated in the contract specifica-
77 tions were the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work."

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14. Plaintiff under date of February 20, 1943, asked defendant to reconsider its appeal regarding minimum wage rates, and this was responded to by letter dated April 13, 1943, from the Chief of Engineers, in part as follows:

"A determination as to the accuracy of the specified wages is not necessary to a decision in this case. The contract by Article 17 and by paragraph 1–31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract. No reason has been shown which would warrant modification of the previous decision dated August 5, 1941."

15. Paragraph 1–12 of the Standard Government Form of Invitation for Bids, a copy of which was furnished to plaintiff, provides as follows:

"Investigation of Conditions.—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local conditions, availability of labor, uncertainties of weather, and other contingencies. In no case will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site. At the bidder's request, a representative of the Government will point out the site of the proposed operations. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work."

16. If plaintiff's president had investigated wage rates, he could have ascertained that the prevailing wage for carpenters was $1.125 per hour, and that the prevailing rate for unskilled labor was $.55 per hour, with an advance to $.625 per hour, effective as of April 1, 1941. Also, before inviting bids on this project, the District Engineer could have ascertained that the Sec-
78 retary of Labor had made a new determination of the prevailing wage rates for Elmira on March 4, 1941.

17. Because plaintiff was required to pay $1.125 per hour to carpenters instead of $1 per hour, as shown in the bid proposal and contract wage schedule, its labor costs were increased $3,786.68. Similarly, plaintiff's labor costs for unskilled laborers and concrete puddlers were increased $3,576.54 as the result of the payment of the $0.55 per hour rate instead of the $0.50 per hour rate

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specified in the contract wage schedule. The total of these amounts, which includes plaintiff's increased payroll insurance and taxes, is $7,363.22.

SHEETING AND SHORING

18. The contract specifications provide in part as follows:

SECTION I

"1-14. Work Areas.—* * *

"(b) The contractor shall be responsible for trespassing upon, or damage to, public and private lands and roads, bridges, buildings, chimneys, and utilities in or adjacent to the work and access areas resulting from any act or omission on his part, including damage caused by disturbance of foundations while conducting any operation within the work area. The contractor shall take special precautions to prevent injury to existing structures while working in the vicinity of the Hygeia plant, Brand building, greenhouse, gas regulation house, private dwellings, and all other buildings and structures located at or close to the edge of the work area. He shall take similar precautions in the vicinity of the pole line crossing the levee at West Hudson Street, the water main at approximate State 176+37, all power facilities at the Hygeia plant, and any other utilities which will not be relocated.

* * * * *

"(d) The garage and other property of the Hygeia Refrigerating Company are within the work area, and the activities of this company will be carried on during construction of the project. The contractor shall cooperate with this company during all construction operations in order to preserve its access and permit its operations to be conducted with a minimum of interfer-
79 ence by the contractor. The contractor shall perform the necessary construction on the company's property in the least practicable time. He shall provide bracing or other protection satisfactory to the contracting officer for the garage wall against which the new wall is placed. The garage and other property within the work area shall be restored to a condition satisfactory to the contracting officer upon completion of the permanent work in that area.

* * * * *

"SECTION III

"3.03. Excavation—Common. * * *

"(b) Procedure. (1) General. Excavation—Common shall be performed in accordance with subparagraph 3-01 (c). Excavation around bridge piers and abutments, existing walls, build-

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ings, chimneys, transformers, power lines, utilities, sewers, culverts, and other existing structures shall be executed with all due precautions, satisfactory to the contracting officer, for safeguarding the structures. (See paragraph 1–14.) Where special work is required to prevent undermining existing structures, it shall be done in accordance with detailed plans prepared by the contractor and approved by the contracting officer, but such approval shall not relieve the contractor of responsibility for damages which may result from the failure of the temporary protection. Where excavation operations endanger the stability of existing or new structures, sheeting and shoring shall be installed at the locations indicated on the drawings or directed by the contracting officer. The contractor shall be responsible for the safety of such structures. (See subparagraph (3) below and paragraph 3–06.) * * *

* * * * *

"(3) Sewers, Culverts, and Drains.—The contractor shall furnish and install sheeting and shoring in all trenches where the depth exceeds 6 feet. * * *

* * * * *

"3–06. Sheeting and Shoring.—(a) General.—The contractor shall furnish and place such sheeting, shoring, bracing, or other approved supports as are indicated on the contract drawings or directed by the contracting officer for the protection of the work or adjoining property. The right is reserved to order the installation of sheeting and shoring where its use is considered
80 advisable for the safety of the work, and to require such sheeting and shoring to remain in place when its removal is considered inadvisable.

"(b) Procedure.—All sheeting and shoring shall be designed by the contractor and approved by the contracting officer prior to installation, but such approval by the contracting officer shall not relieve the contractor of sole responsibility for damages resulting from the inadequacy or lack of any sheeting and shoring. The sheeting and shoring shall be built to provide adequate clearances for minimum interference with construction operations, proper bracing for stability, and safe conditions around the work. If, in the opinion of the contracting officer, any methods or measures of the contractor constitute a hazard in any way or are otherwise improper or inadequate, the contracting officer will notify the contractor of that fact in writing. If the contractor fails to provide immediately such remedial measures as are deemed necessary by the contracting officer, such measures will be provided by the contracting officer at the expense of the contractor. When sheeting and shoring have served their purpose and their removal is

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approved by the contracting officer, they shall be removed and disposed of. Whether sheeting and shoring are removed or left in place, all cavities shall be adequately filled. When approved by the contracting officer, sheeting and shoring may be used in lieu of excavation to full pay lines.

"(c) Measurement.—Sheeting and shoring will be measured by the square foot of protected area.

"(d) Payment.—Except as specified below, payment for all costs of furnishing and placing sheeting and shoring indicated on the contract drawings or directed by the contracting officer, and of its removal and disposal when not left in place, will be made at the contract unit price for "Sheeting (Including Shoring)," Item No. 7. Where sheeting and shoring are used at the contractor's option and with the approval of the contracting officer, separate payment will not be made for the sheeting and shoring, but payment will be made for excavation to the pay lines shown on the contract drawings as though the cut had been made to such pay lines."

19. The schedule of payments incorporated into the contract in suit provided in item 7 that the plaintiff was to be paid for sheeting (including shoring) on a quantity of 9,200 square feet at the rate of 65 cents per square foot, or a total of $5,980.

81 20. Section I, paragraph 1–05, provides in pertinent part as follows:

"1–05. Quantities.—The following estimate of quantities is given only to serve as a basis for comparison of bids and for determining the amount of consideration of the contract;. Within the limits of available funds, the contractor will be required to perform the entire quantity of work necessary to complete the work specified in paragraph 1–02 hereof, be it more or less than the amounts herein estimated.

* * * * *

"Item No. 7 Sheeting (Including Shoring) 9,200 Sq. Ft."

* * * * *

21. As the work progressed, the plaintiff placed sheeting and shoring necessary for the protection of the work as well as that necessary for the protection of existing buildings and structures. Payment was made on account of such sheeting and shoring, as well as the other work performed by the plaintiff, on monthly estimates prepared by defendant's resident engineer and given to plaintiff's superintendent together with a payment voucher for execution on behalf of plaintiff. The plaintiff executed such payment vouchers and forwarded them along with each monthly estimate for payment by the defendant's paying office. On the second such monthly estimate forwarded with a payment voucher by plaintiff, an item of 438 square feet of sheeting, including shoring,

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appears under item 7. On subsequent monthly estimates supporting payment vouchers, under item 7 appears a figure covering additional sheeting, including shoring. The plaintiff accepted monthly payments on such payment vouchers without question as to the manner of computation of the sheeting (including shoring) item until the final estimate was received by the plaintiff showing a total of 10,152 square feet.

22. After all of the work under the contract had been performed, the defendant, through the resident inspector, forwarded proposed final estimate on January 21, 1943. On January 28, 1943, plaintiff's superintendent, Mr. Bernard Gabriel, went to the office of the District Engineer at Syracuse, New York, and conferred with a representative of that official concerning claims for additional payments on various contract items including sheeting and shoring. Following this conference, the plaintiff
82 received a letter dated February 1, 1943, from the District Engineer in which it is stated that:

"In computing pay quantities the following methods were used by this office.

"Sheeting—Computations based on field measurements of length and height of sheeting placed."

23. The plaintiff was paid at the rate of 65 cents per square foot for 10,152.1 square feet of sheeting and shoring. Of this amount 6,738.2 square feet was for the protection of the work, and 3,413.9 square feet was for the protection of property. The plaintiff claims that it should have been paid for 32,899 square feet, 8,094 square feet for the protection of the work, and 24,805 square feet for the proptection of property.

As to the sheeting and shoring required for the protection of the work, it is plaintiff's position that the protected area was the area of side walls of trenches excavated where sheeting was placed.

On many items concerning sheeting placed for protection of the work, the allowance was as great or greater than that claimed, except for 50 square feet of sheeting claimed at the Walnut Street Bridge, which the defendant allowed under sheeting placed for the protection of property. The evidence is not satisfactory as to the measurements by which either the amount claimed or allowed was computed.

As to the sheeting and shoring required for the protection of the property, plaintiff's claim is based not upon the amount of sheeting or shoring placed, but rather upon the ground area covered by the buildings and structures so protected. The ground area of the buildings and structures which was protected by sheeting and shoring is shown below:

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*Ground area of buildings and structures as to which sheeting and shoring was provided*

| | | Square feet |
|---|---|---|
| Brand Building | 175 x 68 | 11,900 |
| Hygeia Wall | 315 x 6 | 1,890 |
| Garage (Main St.) | 54 x 60 | 3,240 |
| House (Connolly Ave.) | 35 x 25 | 875 |
| Florist Shop (Walnut St.) | 30 x 30 | 900 |
| Greenhouse (Walnut St.) | 240 x 25 | 6,000 |
| Total | | 24,805 |

83 24. The plaintiff on February 9, 1943, wrote to the District Engineer requesting that the defendant recompute the allowance for sheeting and shoring.

"* * * by ascertaining the square footage of the area protected by the work performed under this item, pursuant to paragraph 3–06 subdivision (c) and that we be paid therefor at the unit price of said item. * * *"

The defendant reviewed plaintiff's protests and on February 18, 1943, wrote plaintiff that the item had been measured and computed in strict accordance with the provisions of the contract specifications, and the contractor was invited to present additional facts or computations for consideration.

25. The plaintiff failed to accept this invitation but rather by letter dated February 24, 1943, returned a final release of claims wherein was listed an exception to the method of computing the final quantity of sheeting and shoring.

26. Receipt of the release was acknowledged by letter dated March 5, 1943, and the plaintiff was advised of his further rights of appeal under Article 15 of the contract.

27. On March 19, 1943, plaintiff appealed the decisions of the contracting officer to the Secretary of War, and on July 31, 1944, the appeal was denied. This denial reads in part as follows:

"You allege that the method used by the contracting officer in computing the pay quantities for sheeting (including shoring) was incorrect. Paragraph 3–06 (c) of the contract specifications states that sheeting and shoring, '* * * will be measured by the square foot of protected area.' The record shows that the pay quantities of sheeting placed adjacent to existing structures were determined by measurements to specific payment lines where such lines are shown on the drawings. Where specific payment lines were not indicated, the quantities were computed by using the length of the area actually sheeted and the difference in elevation between the top of the sheeting and the bottom elevation of the adjacent structures. The pay quantities for sheeting not placed adjacent to any existing structure were computed by multiplying the difference in elevation between the ground surface and the bottom elevation of the trench by the length of the area sheeted. You

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assert that because of the liability imposed by paragraph 1–14 (b) of the specifications for damages to structures in or
84 adjacent to the work, including damages caused by disturbance of foundations, that the term 'protected area' as used in paragraph 3–06 (c) must be construed to mean the ground area occupied by the adjacent structures and that the computation of pay quantities for sheeting placed to protect such structures must be based on the area thereof. As noted above the payment lines shown on the drawings for sheeting and shoring placed adjacent to the structures clearly indicate that the parties did not intend that payment should be made on the basis of the ground area of the buildings. Furthermore, the estimates [sic] pay quantity of sheeting was only 9,200 square fee approximately 10% less than the quantity of 10,152 square feet for which payment was made and only about 30% of the quantity for which payment is claimed. The contract does provide, as contended by you, that the quantities specified are only estimates. However, the buildings which were to be protected were clearly indicated on the contract drawings. The combined ground area of the buildings alone, aside from the other locations where the plans indicated sheeting was to be placed, is about 2½ times the total area for which it was estimated sheeting would be required. The payment lines indicated on the drawing and the discrepancy between the ground area of the buildings and the estimated quantity of the sheeting should have put you on notice that the Government did not intend that the pay quantities of sheeting and shoring placed adjacent to existing structures would be computed on the basis of the ground area of such structures. No objection has been made of the method employed by the contracting officer in computing pay quantities for sheeting not placed adjacent to structures. As the ground area occupied by a structure has no direct relation to the cost of placing sheeting and shoring adjacent to it, there would appear to be no reason to compute the pay quantities of sheeting placed adjacent to such structures on the basis of the ground area occupied and to compute the pay quantities of sheeting not so placed on an entirely different basis. Under paragraph 1–14 (b) of the specifications you are liable for damages to land as well as to structures. If your contention that the pay quantities of sheeting placed adjacent to existing structures must be computed on the basis of the ground occupied by said structures were to prevail, it would logically follow that the pay quantities for sheeting not placed adjacent to any existing structure should be computed on the basis of the land area protected, even though such area might conceivably comprise many acres. Such as [sic]
85 interpretation is obviously absurd. It is my finding that

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the methods employed by the contracting officer for computing the pay quantities of sheeting and shoring were correct."

CONCRETE FINISHING

28. Article 15 of the contract provides as follows:

"ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

Section 1–20 of the general provisions of the contract specifications provides:

"1–20. Claims, Protests, and Appeals.—(a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Chief of Engineers, whose decision shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, ruling, instructions, or decisions of the contracting officer shall be final and conclusive.

"(b) The Chief of Engineers has been designated by the Secretary of War as his duly authorized representative to make final decision and to take other action where the terms of the contract require that such decision or action shall be 'by the Head of the Department concerned or his duly authorized representative.' All appeals from decisions of the contracting officer authorized under the contract shall, therefore, be addressed to the Chief of Engineers, U. S. Army, Washington, D. C. The appeal shall contain
86 all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract."

Pertinent provisions of the contract specifications, Section VII, dealing with the subject "Concrete" are quoted below:

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SECTION VII. CONCRETE

* * * * *

"7.03. Proportioning and Mixing.—* * *

"(b) Proportioning. * * *

"(2) Control.—The exact proportions of all material entering into the concrete shall be as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the actual amounts of all material entering into the concrete. The proportions will be changed whenever, in the opinion of the contracting officer, such change becomes necessary to obtain the specified strength and the desired density, uniformity and workability, and the contractor will not be compensated because of such changes, except for an increase in the specified minimum unit paste content, as provided herein as follows: In the event it is determined by the contracting officer that concrete of the desired quality cannot be obtained with the specified gradation of aggregates conforming fully to the specifications and the specified minimum unit cement content, he may direct an increase in the unit paste content by the addition of Portland cement, in which case compensation will be made therefor at the cost to the contractor of the cement delivered f. o. b. carrier at the site of the work, plus $0.40 per barrel.

* * * * *

"7–05. Details of Construction.—(a) Forms.—* * *

"(4) Removal.—Forms shall not be removed without the approval of the contracting officer, and all removal shall be accomplished in such manner as will prevent injury to the concrete. Forms shall not be removed from walls and vertical faces before the expiration of 2 days, except when specifically authorized by the contracting officer. When, in the opinion of the contracting officer, conditions on the work are such as to justify it, forms may be required to remain in place for longer periods.

* * * * *

"(d) Finishing.—Immediately following removal of forms, all form tie holes shall be filled, protruding fins or other surface irregularities removed by carborundum stone and all other de-
87 fects repaired. Where necessary to obtain a suitable surface finish, the contractor shall remove the forms and finish the surfaces when and as directed by the contracting officer at no additional cost to the United States. The curing specified in subparagraph 7–05 (e) following shall be temporarily suspended during such repairing or finishing as directed. The finished surfaces shall be free from sand streaks or other defects and the plastering over of such surfaces will not be permitted. Defective

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concrete shall be repaired by cutting out the unsatisfactory material and placing new concrete which shall be formed with keys, dovetails, and anchors to attach it securely to the other work. This concrete shall be drier than the usual mixture and shall be thoroughly tamped into place. All surfaces of concrete, not covered by forms, that are not to be covered by additional concrete or backfill shall have a wood float finish without additional mortar, and shall be true to elevations as shown on contract drawings. Striking-off and finishing shall follow closely the placing operation in order to insure completion before the initial set has taken place. The contractor will not be permitted to start a pour unless a sufficient number of qualified finishers are available to fulfill the above requirements. Care shall be taken to see that all excess water is removed before making the finish. Other surfaces shall be brought to the specified finished elevation and left true and regular as approved by the contracting officer. Where considered necessary by the contracting officer, or where indicated on the drawings, joints shall be made carefully with a jointing tool. Every precaution shall be taken by the contractor to protect finished surfaces from stains or abrasions. No fire shall be permitted in direct contact with any concrete at any time. Concrete surfaces or edges likely to be injured during the construction period shall be properly protected by leaving the forms in place or by erecting covers satisfactory to the contracting officer."

29. Section 1, paragraph 1–11, Work Covered by Contract Price, provides as follows:

"1–11. Work Covered by Contract Price.—The contractor shall, under the contract prices, furnish and pay for all materials, equipment, and labor for all permanent, temporary, and incidental work, furnish all accessories, and do everything which is necessary to carry out the contract in good faith, which contemplates everything completed, in proper working order, of good materials with skillful workmanship, accurately fitted, properly assembled, and connected."

88 30. The placement of concrete began on August 20, 1941, and placement was made from time to time during that construction season until October 24, 1941. During this time monoliths Nos. 1 through 17 were poured. The first concrete which was placed above the foundation and as to which the plaintiff's claim for finishing relates was commenced on September 5, 1941.

31. From the time that the forms were stripped from the exposed concrete lifts above the foundation, the defendant's field representatives complained to Mr. Gabriel, plaintiff's superintendent, of the poor faces on the exposed concrete. After monoliths Nos. 1 through 17 had been poured and the forms stripped from the concrete, there were rust stains showing from the water

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pipes used in curing, and the concrete faces showing numerous blemishes, pockmarks, and honeycombs. Protruding fins had not been removed, and the form tie rod holes had not been filled.

32. Prior to October 29, 1941, defendant complained to plaintiff regarding the tie holes not being plugged as required by paragraph 7–05 (d) of the contract specifications.

33. Under date of July 28, 1941, plaintiff transmitted to defendant some revised prints covering certain form details in the construction of the wall and which made reference to the proposed use of certain porcelain tubes or cylinders for the purpose of putting bolts through said porcelain cylinders which could act as spreaders and thereby increase or lessen the width of the forms.

34. Defendant, by letter dated August 4, 1941, approved plaintiff's revised prints subject to certain provisions which in part provided:

"(e) The approval as indicated above is predicated on producing a finished concrete surface as contemplated in contract specifications, and the right is reserved to require necessary revisions in your form construction to provide uniform finished surfaces on all exposed faces."

35. On October 15, 1941, defendant objected to the further use by plaintiff of visible porcelain tubes which gave the appearance of an unfinished job.

36. Under date of November 15, 1941, defendant wrote plaintiff regarding the unused porcelain tubes and therein stated that
89 plaintiff would be allowed to use these tubes on unexposed concrete wall surfaces and would be paid for the remaining unused porcelain tubes.

37. The defendant has allowed payment for porcelain tubes which were delivered by plaintiff to defendant but not used on the job.

38. On October 20, 1941, the contracting officer addressed and forwarded the following letter to the plaintiff:

"Reference is made to Par. 7–05 (d), Finishing of Concrete Surfaces, of your Contract No. W–321–eng–261 for the construction of the Elmira Flood Protection Project, Section 1.

"I have examined the concrete work constructed to date under your contract and find that it has not been finished in accordance with the provisions of the contract specifications. You are directed to correct these deficiencies at once. My field representatives will indicate the defective work and furnish details of the required corrective measures."

39. By letter dated October 29, 1941, defendant's Resident Engineer forwarded a detailed statement of corrective measures to be taken by the contractor in two parts, the first relating to the treatment of monoliths Nos. 1 through 17 which had then been

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placed, and the second relating to the treatment of concrete which had not then been placed. The detailed statement of corrective measures provides as follows:

"METHOD OF TREATING EXISTING WORK

"The surface to be treated will be scrubbed with a wire brush where necessary to clean out defective areas.

"Mix one part portland cement with two parts fine sand (similar to that used on the project from which particles retained on the No. 16 sieve has been removed) with water sufficient to produce a grout having the consistency of very thick paint. If necessary, white portland cement shall be added, replacing an equal quantity of standard cement, in a quantity sufficient to give a color equal to the concrete in the project. A test of the procedure and color will be made on a panel which is to be covered with backfill. This mixture shall be carefully worked out so that no difference in color will result from the grout. This mixture shall be allowed to set for 45 minutes before being used. The surface of the con-
90 crete to be treated shall be thoroughly wet, after which the grout shall be applied with a brush or cloth completely filling air bubbles and holes. Immediately after applying the grout scour the wall vigorously with a cork or wood float. The grout shall then be allowed to set partially for an hour or two, depending on the weather, until it has hardened sufficiently so that it can be scraped from the wall with the edge of a steel trowel without removing the grout from the small air holes. Next allow the surface to dry thoroughly one or two hours or more depending on the weather until the initial set occurs and rub it vigorously with a burlap bag to completely remove any dried grout. There shall be no visible film of grout remaining after this rubbing. The entire cleaning operation for any monolith shall be completed the same day it is started. The entire exposed surface of the monolith shall be treated in this manner. If any dark streaks or spots remain after this operation they shall be rubbed lightly with a fine carborundum stone. This rubbing must be carefully done to avoid changing the texture of the concrete.

"After the grout has become thoroughly set (24 hours in warm weather and 48 hours in cold weather) curing will commence and continue for at least seven days. Curing shall be accomplished by covering finished surfaces promptly with damp burlap or cotton quilts. (Heating will not be necessary on old walls.)

"METHOD OF TREATING NEW CONCRETE WORK

"The forms on work that is to be exposed shall be removed as soon as it is possible to do so without injury to the concrete. In

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warm weather (minimum 65° F., average 75° F.) this will be approximately 24 hours after the completion of placing. In colder weather the forms should be allowed to remain in place approximately 48 hours.

"Immediately after the forms have been removed all fins or other projections shall be broken off with a carborundum stone or other suitable tool which will remove the projections without marring the surrounding surfaces. Filling of form tie holes shall be concurrent with the removal of fins, etc. This operation shall be separate from general finishing and shall be accomplished with retempered mortar. This mortar shall have the same sand-cement ratio as the concrete in the original work. Sufficient water shall be added to make a dry mixture. This mortar shall be thoroughly mixed, allowed to set for one hour and then remixed before being used. The material shall be thoroughly tamped into the tie
91 holes and care shall be taken not to smear or deface the surrounding surfaces. Other patching of honeycomb or similar defects shall also be accomplished with sand-cement mortar as described above. All patches shall bond with the steel reinforcement and shall, if feasible, be dovetailed to the existing work. Dish shaped patches with sloping sides shall not be permitted.

"Upon completion of repair work as outlined above, the entire exposed surface shall be treated as follows:

"A thin sand-cement mortar shall be applied to the entire surface with a steel trowel. This mortar shall be composed of one part cement and two parts sand to which water shall be added until the mortar has the consistency of very thick paint. If necessary, white cement shall be used replacing an equal quantity of regular cement so that the dry mortar will have the same color as the concrete in the structure. Panels shall be experimented with on concrete surfaces which will be covered in order to assure this similarity in color. This application shall be sufficiently vigorous to insure the complete filling of all pockmarks or other blemishes. The sand for this mortar shall be the sand as regulaly [sic] used in the concrete work except that the sizes retained on a No. 16 sieve shall be removed. The mortar applied to the concrete surface shall be allowed to set for one hour and the surplus shall then be removed by scraping the surface lightly with the edge of a steel trowel or steel float. After the lapse of sufficient time to allow initial set or hardening of the mortar, the surface shall be vigorously rubbed with Clean Dry Burlap which shall entirely remove the mortar on the surface of the concrete. Initial curing shall be commenced immediately after this operation and shall consist of covering the finished surface with Clean Wet Burlap. Normal water curing will commence 12 hours later. Finishing of concrete surfaces shall be completed in the minimum possible

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time and in no case shall the finishing be extended over more than a 12 hour period. (This is specified because the color of the finished surface may vary with atmospheric conditions and make blending with adjacent finished surfaces difficult.)"

40. Upon receipt of the letter and its enclosure referred to in the foregoing finding, the plaintiff on October 31, 1941, addressed the following letter to the contracting officer:

"Receipt is acknowledged of your letter of October 29th relative to certain finishing which you desire us to do on the concrete already placed on this project. It seems wise at this time
92 to review briefly, for the record, the procedure which has previously taken place and which must therefore be responsible for the appearance of these concrete walls. Before reviewing this procedure, let me state that we are already proceeding to do as directed in your letter of October 29th, and that we will at all times proceed with any of your instructions, our desire, however being, of course, that we be protected insofar as the matter of reimbursement to us, for any expenses plus normal profit incurred in carrying out any such instructions, is concerned.

"The aggregates used in the Elmira work, gravel, sand, and cement, were all previously approved by your representatives and accepted for this work. The water is the same as that used by the people of Elmira for drinking water and has also been approved by your representatives. The characteristics of the mixture, insofar as the porportion [sic] of the component parts, was set by your representatives after exhaustive tests on their part. The form lining used was approved by your representatives and the forms themselves compare in construction very favorably as to strength, appearance, etc., with any used in the district, and this we have on the authority of the Acting Chief of Operations. We come, therefore, to the mixing and placing of the concrete, and at all times these procedures have been directly and completely under the control of your representatives. No latitude has been allowed us for the carrying out of any opposing ideas we may have had in this work, ideas which may or may not have secured a better result, but in any event we were not allowed to try them out. We must therefore, in view of all the above, respectfully suggest that the responsibility for any result which may not appeal to you, does not lie on our shoulders.

"It is our understanding that costs are being kept by your representatives as well as by ourselves on the additional expense that is now accruing because of the finishing operations which you have directed, and that on the conclusion of these operations a satisfactory settlement will be reached to reimburse us for this expense. If this understanding is not in accordance with yours, we should appreciate being advised at once.

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"Your consideration and advice on all the above will be appreciated."

41. After monoliths Nos. 1 through 17 were treated in accordance with the procedure outlined for existing work, the plaintiff submitted on November 27, 1941, a request for the payment of the sum of $864.07 covering the cost of such work.
93 This sum resulted after an allowance of $111.75 had been deducted as the cost of filling form tie rod holes.

On December 10, 1941, the contracting officer by letter acknowledged receipt of the above letter and stated as follows:

"I find that the finishing treatment required on your job is well within the intent of paragraph 7–05 (d), and I cannot consider additional payment for this work."

Following receipt of the above letter, Mr. Fred Davis, vice president of plaintiff, conferred with the District Engineer on December 15, 1941. After this conference, the plaintiff addressed the following letter to the contracting officer:

"As a result of a conference held this morning with the District Engineer, Mr. Samples, and myself, my understanding of the conclusions reached at this conference is outlined below.

"1. I understand that our company is not giving up any of our rights to future consideration of our claim for the cost of the treatment of the walls constructed during 1941 by reason of not appealing at this time the decision of the District Engineer outlined in his letter of December 10th.

"2. That consideration will be given to payment by the United States for any increase in our costs because of any change in the kind of aggregates composing the concrete mixtures or because of any change that may be prescribed in handling the concrete.

"3. That the treatment of the walls in the future will be modified, in that treatment will be required only on the land side of the walls except that at bridge approaches where treatment shall be on both sides of the walls for a distance of three or four monoliths from the bridge approach; such treatment shall immediately follow the removal of the forms and shall consist of rubbing the concrete with carborundum [sic] stone and brushing with a light coat of mortar if required. It will also, of course, be necessary for us to block the holes at the form tie rods.

"We would appreciate knowing as to whether your understanding is in general accordance with the above."

42. The contracting officer replied by letter of Decembr 29, 1941, as follows:

"Reference is made to your letter dated December 15, 1941, regarding your understanding of conclusions reached at a conference in my office on December 15, 1941, on concrete construc-

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94 tion at the Elmira Flood Protection Project, Section No. 1, Contract No. W–321–eng–261.

"Using the same numerical index as used in your letter you are advised that conclusions reached in the conference were as follows:

"1. Your right of appeal from my decision on payment for wall treatment is established in Article 15 of the contract.

"2. Any redesign of concrete mixtures or required changes in methods of handling concrete not within the scope of specifications which causes increased cost will be cause for consideration of increased payments to you.

"3. Treatment of walls will be required on the landside of all walls and on the streamside of walls approximately 100 feet upstream and downstream of all bridges, approaches, or other similar places where relatively close scrutiny is easily attained. In addition to the above treatment regular patching of tie rod holes, replacing unsatisfactory spots, repair of honeycombs, etc., will be required on all surfaces in accordance with specification requirements."

43. On February 9. 1943, the plaintiff filed a protest with the contracting officer listing five items of claim but not including the claim for concrete finishing. This was replied to by letter of February 18, 1943, by the contracting officer, in which the following statement is made:

"In view of the fact that your letter and this reply are repetitions of previous protests and decisions, and that no progress is apparent in the settlement of this dispute, it is suggested that, in event you elect to prosecute this matter further, you arrange to present detailed facts, computations, etc., either by letter or at a conference in this office."

On February 24, 1943, the plaintiff forwarded an executed copy of a release dated February 19, 1943. In this release, the plaintiff excepted a claim by reason of concrete finishing operations.

"* * * in a manner and to an extent not required by the contract plans and specifications. * * *"

The plaintiff suggested in the letter transmitting the release that $100 be withheld from payment due it on its final estimate. In this letter the plaintiff also discussed the concrete finishing claim and protested the sums allowed for the concrete items
95 in the final estimate and requested an opportunity to submit detailed data as to the cost of performing this "additional" work.

44. The contracting officer on March 5, 1943, sent the following letter to plaintiff:

"Receipt is acknowledged of your letter dated February 24, 1943, transmitting executed copies of standard release form for

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Contract No. W–321–eng–261, and an application for reconsideration of a previous appeal, addressed to the Chief of Engineers, relative to minimum wage rate.

"Reference is made to the exception listed in your formal release to Contract No. W–321–eng–261, and you are advised, as follows, as to the action taken by this office relative to the various claims.

"(a) The decision relative to additional payment for work in connection with treatment of concrete surfaces, was given in letter from this office dated December 10, 1941. Reference is made to letter from this office dated December 29, 1941, informing you of your right to appeal the decision of this office as established in Article 15 of the contract. As no appeal was made as per Article 15 of the contract, it is considered that your right to appeal has been forfeited.

"(b) A decision relative to the other exceptions to the release; namely, payment of Sheeting (Including Shoring) Contract Item No. 7; payment of Copper, Contract Item No. 28, and payment of Contract Item No. 6, Removal—Walls, Slabs, Paving, Building Foundations (Concrete or Masonry) was given in letter from this office dated February 18, 1943.

"Your right of appeal from my decision on payment of the items covered in paragraph (b) above is established in Article 15 of the contract. The time allowed for appeal will expire thirty days from date of this letter.

"You are further advised that a voucher is being prepared for your signature for the partial estimate now due, less $100.00, as requested in your letter of February 19, 1943."

45. The plaintiff on March 19, 1943, appealed the decision of the contracting officer of Fbruary 18, 1943, and claimed in addition to the sheeting and shoring item and other items not here material, a concrete finishing item of $7,082.74 of which $862.42 was claimed for the finishing of monoliths Nos. 1 through 17 as to which the detailed statement of corrective measures
96 related to the Method of Treating Existing Work, and $6,220.32 was claimed for the finishing of all other work as to which finishing was performed pursuant to the Method of Treating New Concrete Work contained in such detailed statement.

The contracting officer on June 2, 1943, forwarded his findings of fact on the plaintiff's claim to the Chief of Engineers. So far as here material, this finding of fact provides as follows:

"4. With reference to finishing concrete surfaces (paragraph 3a above), the contractor was required, in accordance with the contract specifications, to finish exposed concrete wall surfaces. The contractor offered verbal and written protest all of which were duly considered prior to the District Engineer's decision dated December 10, 1941 (Exhibit F), which denied the con-

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tractor's request for additional payment. After a conference in the District Engineer's office on December 15, 1941, the contractor forwarded the letter of the same date which he quotes on page 8 of his appeal. The District Engineer in turn with letter dated December 29, 1941 (Exhibit G), replied to the contractor's letter of December 10, 1941, and denied his request for additional compensation. The contractor was advised of his further rights of appeal under Article 15 of the contract. Records of this office do not disclose any further correspondence on this item of complaint prior to receipt of the final release (Exhibit Q), which was returned with letter dated February 24, 1943 (Exhibit D)."

On April 29, 1944, the contracting officer forwarded a supplement to his findings of fact dated June 2, 1943, to the Chief of Engineers. It provided as follows:

"1. The following facts concern that portion of the contractor's appeal pertaining to the finishing of concrete surfaces and is supplementary to the facts presented in paragraph four of Findings of Fact, dated 2 June 1943.

"2. Operations under the subject contract were commenced on 3 June 1941. Placement of concrete commenced on 19 August 1941 and a total of 955 cubic yards of Class A concrete, Item 20, was placed through 24 October 1941, the date concrete operations were suspended for the winter season. During the first season the contractor after the removal of forms did not attempt to patch holes or remove surface irregularities from the exposed
97 concrete surfaces as required by paragraph 7–05d of the contract specifications. The District Engineer on 15 October 1941 inspected the site of the work and verbally directed that immediate action be taken to remedy the unsightly condition presented by the unfinished concrete surfaces. The contractor was formally directed by letter dated 20 October 1941 (attached as Inclosure No. 1) to correct the surface deficiencies in a manner to be indicated by the resident engineer. The resident engineer by letter dated 29 October 1941 (see page 10 of contractor's appeal) furnished the contractor a complete set of instructions for the guidance of the contractor. Two procedures were outlined: the first pertained to finishing concrete placed and cured under the contract prior to the issuance of said instructions, the second procedure outlined a more timely method of finishing to be applied on subsequent work. The contractor complied with the instructions as outlined and by letter dated 27 November 1941 (attached as Inclosure No. 2) presented a bill in the amount of $864.07 for finishing 5,330 sq. ft. of concrete surface. The District Engineer by letter dated 10 December 1941 (Exhibit F of Findings of Fact) denied the contractor's request for additional payment on the

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grounds that the work performed was within the intent of the specification. The subsequent history is as outlined in paragraph 4 of the original Findings of Fact dated 2 June 1943."

46. Thereafter on June 19, 1944, the plaintiff filed with the Chief of Engineers a memorandum in further support of its appeal.

47. The Acting Chief of Engineers by letter of July 31, 1944, forwarded to plaintiff his decision denying the plaintiff's appeal which provided in pertinent part as follows:

"You claim additional compensation in the amount of $7,082.74 for finishing concrete in a manner allegedly not required by the contract specifications. It is not now contended by you that an appeal was taken within thirty days from the date of the contracting officer's decision denying your claim in the amount of $862.42 for finishing concrete erected in 1941 as required by paragraph 1–20 of the contract specifications. Thus further consideration of this item is precluded. In regard to the item of $6,220.32 for finishing concrete erected in 1942, the only question involved is whether instructions issued by the Contracting Officer for said work exceed the requirements of the contract. An examination of the applicable provisions of the specifications and the
98 instructions issued by the contracting officer clearly show that the claim for this item was properly denied. Paragraph 7–05 (d) of the specifications requires you to finish the concrete surfaces, '* * * as directed by the contracting officer * * *' without any compensation in addition to that provided in the contract unit prices for concrete. This provision does not obligate you to comply with arbitrary instructions issued by the contracting officer. It does require you, however, to comply with any reasonable instructions of the contracting officer and to finish the concrete in a sightly and workmanlike manner. The instructions issued by the contracting officer for finishing 'new concrete work' are reasonable and represent the minimum requirements for a workmanlike job. Your appeal for additional compensation for finishing concrete is therefore denied."

A reconsideration of the appeal was thereafter requested on behalf of the plaintiff and on October 1, 1946, the Chief of Engineers reaffirmed the action by the Acting Chief of Engineers of July 31, 1944, referred to above.

48. The plaintiff appealed the decision of the Chief of Engineers to the War Department Board of Contract Appeals. The president of this Board on January 10, 1947, as the authorized representative of the Secretary of War, dismissed the appeals following the decision of the Board which found that it had no jurisdiction to entertain them.

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49. On monoliths Nos. 1 through 17, 5,330 square feet of concrete surface was treated in accordance with the direction of the contracting officer. The plaintiff by its letter of November 27, 1941, claimed a total of $864.07 for such surface treatment, itemized as follows:

*Labor*

Oct. 27/41 to and incl. Nov. 18/41

| | |
|---|---|
| 124 Hours @ $1.50 per Hour | $186.00 |
| 127 Hours @ $1.25 per Hour | 158.75 |
| 522.5 Hours @ $0.75 per Hour | 391.87 |
| 20 Hours @ $1.87 per Hour | 37.40 |
| 5 Hours @ $2.25 per Hour | 11.25 |
| 6 Hours @ $0.80 per Hour | 4.80 |
| 4 Hours @ $1.125 per Hour | 4.50 |
| Total labor | 794.57 |
| 99 Less clean and plug form tie rod holes, 149 hours @ $0.75 per hour | —$111.75 |
| Balance due a/c labor | 682.82 |
| Rent of scaffold (swinging) | 18.00 |
| Material of built scaffold | 15.00 |
| 2 carborundum stones | 2.50 |
| 2 trowels | 1.70 |
| 3 wire brushed [sic] | 1.80 |
| 2 plaster brushes | 2.10 |
| 2 bags cement | 1.19 |
| 1 bag cement (white) | 2.50 |
| 0.2 ton sand | .40 |
| Compenstion [sic] and other insurances @ $8.423 per hundred dollars of payroll | 57.51 |
| Total labor, material and accessories | 785.52 |
| 10% on the above to allow for overheads and profit | 78.55 |
| Total | 864.07 |

No proof of damages relating to the claim was made other than the claim itself.

50. The plaintiff claims as the extra cost to it of the concrete finishing during 1942, in accordance with the directions of the contracting officer relating to new work, the sum of $6,070.19 itemized as follows:

| | |
|---|---|
| Labor | $5,934.64 |
| Material | 100.00 |
| Small tools | 50.00 |
| Compensation, P. L. & P. D., $7.24 per H. of P. R. | 429.67 |
| State Unemployment, 2.7% | 160.24 |
| Social Security, 1% | 59.35 |
| Total | 6,733.90 |
| Profit, 10% | 673.39 |
| Total | 7,407.29 |

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| | |
|---|---|
| Chargeable to work as called for in the Specifications, 27,944 S. F. @ $0.05 per S. F., incl. all insurances, bond, profit, etc | $1,397.20 |
| Balance | 6,010.09 |
| Bond | 60.10 |
| Total Claimed, 1942 | 6,070.19 |

100 It is noted that in the computation above a credit of five cents per foot is allowed by plaintiff as the cost which it feels is properly chargeable to it for the finishing according to the contract specifications.

Excepting such credit shown, the entire claim is based upon labor cost and other costs in turn based upon the cost of labor with the further exception of $150 for material and small tools. Since as the secretary of the plaintiff testified, certain original payroll records have been lost due to some cause beyond his knowledge, it is not possible to verify the extra cost of concrete finishing in 1942 relating to new work.

*Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover, and it is therefore adjudged and ordered that it recover of and from the United States seven thousand four hundred sixty-three dollars and twenty-two cents ($7,463.22).

*Opinion*

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff brings this suit to recover under its contract with the War Department Corps of Engineers for the construction of a flood wall along the Chemung River in Elmira, New York. Plaintiff presents three claims as follows:

| | |
|---|---|
| Claim for reimbursement of wage rates paid to carpenters, laborers, and concrete puddlers | $15,597.38 |
| Claim regarding measurement of sheeting and shoring | 14,785.55 |
| Claim for finishing of concrete | 6,934.26 |
| Total | 37,317.19 |

Plaintiff's first claim is that it was misled by defendant as to the wages it would be required to pay in carrying out the contract. Briefly stated, the facts anent this controversy are these:

On March 29, 1941, plaintiff received from the Binghamton, New York, District office of the Corps of Engineers an invitation to bid upon the construction of Section 1 of the Elmira Flood Protection Project. Plaintiff submitted a bid which defendant

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accepted on May 14, 1941. Formal notice to proceed was issued on June 5, 1941.

101 The Standard Government Form of Invitation to Bid contained the following provision:

"*Investigation of Conditions.*—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local conditions, *availability of labor*, uncertainties of weather, and other contingencies. * * * Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work." [Italics supplied.]

However, the contract specifications attached to the Invitation for Bids contained the following provision:

"1–31. Wage and Labor Provisions.—(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

| *Designation* | *Wage rate, hourly* |
|---|---|
| Carpenters, journeymen | $1.00 |
| * * * * * | |
| Laborers, unskilled | .50 |
| Laborers, concrete puddlers | .50 |
| * * * * * | |

This minimum determination had been made by the Secretary of Labor on January 31, 1941, at the request of the Corps of Engineers preparatory to including it in the Invitation for Bids for this contract. Such a determination was required by the Davis-Bacon Act of August 31, 1935, 49 Stat. 1011, 40 U. S. C. §§ 276a, 276a–1.

However, at the time defendant issued the invitation for bids on March 29, 1941, and included therein the foregoing specifications relative to wage rates, the Secretary of Labor had since issued a new determination of the prevailing wage rates for Elmira. This was furnished to the Public Buildings Administration on March 4, 1941. In this it was said that the prevailing wage rates were as follows:

| *Classification* | *Hourly rate.* |
|---|---|
| Carpenters, journeymen | $1.125 |
| Laborers, unskilled | .55 |

102 This was not communicated to the Corps of Engineers, but the District Engineer was informed by the labor union as early as October 22, 1940, that a $0.125 per hour increase for carpenters would take effect on January 1, 1941. Despite this

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knowledge, the District Engineer before inviting bids on March 29, 1941, did not attempt to ascertain whether or not the Secretary of Labor had made a redetermination of the prevailing wage rates since his determination of January 29, 1941. Had he done so he would have learned of the determination of March 4, 1941.

Prior to the submission of its bid, plaintiff did not attempt to make an independent investigation of the prevailing wage scale for the classes of labor to be utilized on this contract, but it computed its bid in reliance upon the schedule of minimum wage rates contained in the specifications furnished.

When work on the project was started on June 3, 1941, plaintiff was unable to obtain workmen for the rates specified, but had to pay the prevailing union rate of $0.625 per hour for unskilled laborers, including concrete puddlers, and $1.125 per hour for carpenters. The rate for carpenters was put into effect on January 1, 1941. Prior to the Invitation for Bids the rates for common laborers had increased from $0.50 to $0.55, and on April 1, 1941, they had risen to $0.625.

Plaintiff promptly notified the District Engineer, the contracting officer, that the minimum wage rates set forth in the contract specifications were less than the currently prevailing rates, but plaintiff was informed by the District Engineer on June 27, 1941, that the minimum wage rates had been determined in accordance with the applicable law and regulations, and, consequently, that he could not grant any relief. Plaintiff appealed this decision to the Chief of Engineers on July 10, 1941. This appeal was denied by the Chief of Engineers on August 5, 1941, principally on the ground that he lacked authority in law "to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions of the above cited act [49 Stat. 1011]."

Following the completion of this project in December 1942, plaintiff on February 20, 1943, requested the Chief of Engineers to reconsider his action in dismissing its appeal of July 10, 1941.

On April 13, 1943, the Chief of Engineers declined to change
103 his earlier decision stating (1) that the contract made no representation as to the actual wage scales which would be in effect, and (2) that the increased costs did not arise from plaintiff's contract obligations but from economic conditions which were ordinary contingencies contemplated under the terms of the contract.

The specifications furnished to plaintiff in connection with the invitation to bid specified the minimum wages to be paid in accordance with the determination of the Secretary of Labor. This determination was made by him pursuant to the requirements of the Davis-Bacon Act, supra, which required him to determine the minimum wages to be paid "based upon * * * the wages * * *

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determined * * * to be prevailing" in the locality. His determination, therefore, so far as plaintiff's rights are concerned, amounted to a determination of the prevailing wage. When made, his determination was correct, but before bids were invited, wages had gone up and he had made a new determination. Thus, when the Corps of Engineers represented that the Secretary of Labor had determined the prevailing wage rates to be $0.50 and $1, this was a misrepresentation, although an unintentional one. Nevertheless, it was one upon which plaintiff was entitled to rely.

It was a positive representation, and, therefore, one from the consequences of which the defendant cannot be relieved because of the provision requiring the contractor to investigate "the availability of labor." When defendant made this representation it assumed responsibility for its accuracy.

The fact that such a determination had been made some months before bids were requested does not relieve defendant. Plaintiff was entitled to rely on it as the Secretary's latest determination—as a representation of the wages it would have to pay when the work was to be done.

The District Engineer had been advised by the union months before the Invitation for Bids was issued that the rate for carpenters would be increased effective on January 1, 1941. Before issuing the invitation he should have made certain that the rates in effect were those he was representing them to be.

Plaintiff, therefore, is entitled to recover the difference between the wages specified in the Invitation for Bids ($0.50 and
104 $1.) and those which the Secretary of Labor determined on March 4, 1941 to be the prevailing wages ($0.55 and $1.125). Albert & Harrison, Inc. v. United States, 107 C. Cls. 292, 68 F. Supp. 732, cert. denied, 331 U. S. 810. In Irwin & Leighton v. United States, 115 C. Cls. 18, 32, the Court held that there was no misrepresentation. It did not intend to hold and did not hold that had there been a misrepresentation plaintiff could not recover.

Plaintiff urges that an additional misrepresentation took place following the issuance of invitations to bid and prior to the acceptance of plaintiff's bid when the District Engineer failed to obtain from the Secretary of Labor an amendment of the contract wage schedule to reflect the increase from $0.55 to $0.625 obtained by the union for unskilled laborers and concrete puddlers on April 1, 1941. However, plaintiff has failed to establish any of the circumstances surrounding this increase, so that it is impossible to determine whether the District Engineer knew or should have known of its existence at the time he awarded this contract to plaintiff. Furthermore, the evidence does not reveal that the Secretary of Labor made a wage determination recognizing this rate prior to the acceptance of plaintiff's bid. In the absence of such

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proof there is no foundation for the claim that the District Engineer misrepresented to plaintiff the existence of this additional increase.

Plaintiff's next claim is that defendant incorrectly computed the amount due for "sheeting and shoring."

The construction of the new flood wall necessitated much trench excavation, both in open unimproved areas and also in close proximity to six buildings adjacent to the project site. In order to maintain safe working conditions and in order to furnish adequate lateral support for the adjoining structures, the contract called for the installation of an estimated quantity of 9,200 square feet of sheeting and shoring. It provided that plaintiff was to receive $0.65 per square foot for the quantities actually installed to be measured by the "square foot of the protected area."

Plaintiff accepted, without protest, monthly payments for this work based upon the estimates of the defendant's resident engineer, but, when on completion of the project the Government's final estimate of the sheeting and shoring installed was substan-
105 tially less than plaintiff's computation, plaintiff protested and requested information as to the method used by the Government in obtaining its total. Plaintiff was advised that of the 10,152.1 square feet of sheeting and shoring contained in the Government's final estimate, 6, 738.2 square feet were for the protection of the work (trenches) and 3,413.9 square feet were for the protection of adjacent property.

Plaintiff disagreed with this computation and on February 9, 1943, wrote to the District Engineer requesting a recomputation. The District Engineer denied this request, saying that the measurements had been made in strict accordance with the provisions of the contract specifications. Plaintiff on March 19, 1943, filed an appeal with the Secretary of War, but the Secretary of War denied plaintiff's appeal, stating in part as follows:

"* * * The record shows that the pay quantities of sheeting placed adjacent to existing structures were determined by measurements to specific payment lines where such lines are shown on the drawings. Where specific payment lines were not indicated, the quantities were computed by using the length of the area actually sheeted and the difference in elevation between the top of the sheeting and the bottom elevation of the adjacent structures. The pay quantities for sheeting not placed adjacent to any existing structure were computed by multiplying the difference in elevation between the ground surface and the bottom elevation of the trench by the length of the area sheeted. * * *"

Plaintiff agrees with defendant's method of computation of the shoring for the protection of the work, but says that the computation was in error.

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In many decisions both this court and the Supreme Court have held that under contracts similar to the one in this case, the decision of the contracting officer on the amount of work done is conclusive. See e. g., B–W Construction Co. v. United States, 101 C. Cls. 748, 768, reversed on other grounds, 324 U. S. 768; Penker Construction Co. v. United States, 96 C. Cls. 1; Wunderlich v. United States, 342 U. S. 98.

As to the computation for the protection of the buildings adjacent to this project, plaintiff urges that under the terms of the specifications, which provided that sheeting and shoring would be measured by the "square foot of the protected
106 area," the District Engineer should have computed the pay quantities on the basis of the ground area of the buildings and structures so protected, that is to say, if the building to be protected had a total area of 100′ x 50′, it should be paid for 5,000 square feet. Defendant computed the amount by taking the difference between the "top of the sheeting and the bottom elevation of the adjacent structures."

We must, therefore, determine the meaning of the term "protected area" as used in the specification. The decision of the District Engineer upon this question is not final. Bell Aircraft Corp. v. United States, 120 C. Cls. 398, 100 F. Supp. 661, cert. granted, 343 U. S. 913; McWilliams Dredging Co. v. United States, 118 C. Cls. 1; W. E. Callahan Construction Co. v. United States, 91 C. Cls. 538.

Both sides have offered expert testimony to aid the court in determining the meaning of this term. It shows that the purpose of this sheeting and shoring was to replace the natural support removed in the course of excavation. The ground area of a structure from which a portion of the natural support has been removed does not appear to have any reasonable relationship either to the amount or to the cost of providing the substitute support. Rather, the "protected area" is the area of the surface laid bare by excavation, such as the foundation wall of a building next to which sheeting is placed. Defendant computed it on this basis. Plaintiff is not entitled to recover upon this cause of action.

Plaintiff's next claim is on defendant's requirements for the finishing of the concrete.

The contract specifications contained detailed instructions as to the manner in which the concrete was to be mixed, placed, cured and finished. Paragraph 7–05 (d) of the specifications provided:

"(d) Finishing.—Immediately following removal of forms, all form tie holes shall be filled, protruding fins or other surface

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irregularities removed by carborundum stone and all other defects repaired. Where necessary to obtain a suitable surface finish, the contractor shall remove the forms and finish the surfaces when and as directed by the contracting officer at no additional cost to the United States. The curing specified in subparagraph 7–05 (e) following shall be temporarily suspended during such
107 repairing or finishing as directed. The finished surfaces shall be free from sand streaks or other defects and the plastering over of such surfaces will not be permitted. Defective concrete shall be repaired by cutting out the unsatisfactory matereial and placing new concrete which shall be formed with keys, dovetails, and anchors to attach it securely to the other work. This concrete shall be drier than the usual mixture and shall be thoroughly tamped into place. * * *"

When the forms were stripped from monoliths Nos. 1 through 17 an unsightly and unsatisfactory surface condition was revealed. Portions of the surface were stained with rust from the water pipes used in curing. Other areas showed numerous honeycombs, air bubbles, and pockmarks. Defendant's resident engineer called these conditions to the attention of plaintiff's superintendent and directed him to finish these surfaces in the manner he said was required by the contract specifications. These instructions were disregarded until on October 20, 1941, the contracting officer directed the following letter to plaintiff:

"Reference is made to Par. 7–05 (d), Finishing of Concrete Surfaces, of your Contract No. W–321–eng–261 for the construction of the Elmira Flood Protection Project, Section 1.

"I have examined the concrete work constructed to date under your contract and find that it has not been finished in accordance with the provisions of the contract specifications. You are directed to correct these deficiencies at once. My field representatives will indicate the defective work and furnish details of the required corrective measures."

Thereafter, on October 29, 1941, defendant's resident engineer furnished plaintiff with a detailed statement of the corrective measures which were to be taken, which required plaintiff, among other things, to remove all protruding fins, cut out and patch honeycombs, fill the form tie rod holes, and then place over the entire surface a thin coat of mortar composed of sand and white portland cement.

On October 31, 1941, plaintiff replied to the District Engineer stating that it would carry out such instructions subject to its right to recover the resulting additional expenses. After finishing the surfaces of monoliths Nos. 1 to 17 in accordance with these instructions, plaintiff, on November 27, 1941, submitted a

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108 request to the District Engineer for the payment of $864.07 to cover the cost of this portion of the work. The District Engineer on December 10, 1941, denied plaintiff's request because, he said, the finishing treatment was required by the specifications. Plaintiff's additional claim of $6,070.19 for the cost of finishing the surface of concrete placed in 1942 was denied on the same grounds, as were plaintiff's subsequent appeals.

We think the District Engineer's decisions were correct. While the original contract specifications indicated in a general way the results to be obtained, they did not specify in detail any particular method to be used by the contractor in obtaining a suitable surface finish. It was thus necessary and proper for the District Engineer, upon whom, as contracting officer, responsibility for the satisfactory performance of this project was placed, to direct the issuance of instructions supplementing, where necessary, the original specifications. Barlow v. United States, 35 C. Cls. 514.

Paragraph 7–05 (d) of the specifications required that the finished surface of the concrete "shall be free from sand streaks or other defects" and it prohibited "the plastering over of such surfaces." It also provided:

"* * * Where necessary to obtain a suitable surface finish, the contractor shall remove the forms and finish the surfaces when and as directed by the contracting officer at no additional cost to the United States. * * *"

No more was required of plaintiff than was justified by the specifications.

In addition to the $100 which the United States withheld from the final payment made to plaintiff, and which the United States concedes to be due and owing, plaintiff is entitled to recover $7,363.22, making a total of $7,463.22.

It is so ordered.

HOWELL, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

109 *Judgment of the court*

Filed October 7, 1952

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States seven thousand four hundred sixty-three dollars and twenty-two cents ($7,463.22).

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111 *Proceedings after entry of judgment*

On December 5, 1952, plaintiff filed a motion to amend the judgment of the court, or in the alternative, for a new trial.

On December 22, 1952, defendant filed a motion for a new trial.

On January 13, 1953, the court entered the following order on said motions:

ORDER

These cases come before the Court on motions for rehearings, amendment of judgments or new trials under Rule 53 of the Rules of this Court, on consideration thereof,

It is ordered this thirteenth day of January, 1953, that said motions be and the same are overruled as follows:

"48525. Binghamton Construction Company, Inc. Plaintiff's motion to amend judgment or for new trial and Defendant's motion for new trial."

* * * * *

By the Court:

(S) MARVIN JONES,
*Chief Judge.*

113 [Clerk's certificate to foregoing transcript omitted in printing.]

114 In the Supreme Court of the United States

No. 65, October Term, 1953

THE UNITED STATES, PETITIONER

*v.*

BINGHAMTON CONSTRUCTION CO., INC.

*Order extending time to file petition for writ of certiorari,*

Upon consideration of the application of counsel for petitioner

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 13th, 1953.

FRED M. VINSON,
*Chief Justice of the United States.*

Dated this 13th day of April 1953.

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115 In the Supreme Court of the United States

No. 78, October Term, 1953

BINGHAMTON CONSTRUCTION CO. INC., A CORPORATION, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*Order extending time to file petition for writ of certiorari*

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 18, 1953.

FRED M. VINSON,
*Chief Justice of the United States.*

Dated this 13th day of April 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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SUPREME COURT OF THE UNITED STATES

No. 65, OCTOBER TERM, 1953

THE UNITED STATES, PETITIONER,

vs.

BINGHAMTON CONSTRUCTION CO., INC.

*Order allowing certiorari. Filed October 12, 1953*

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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